TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~275~~ 28.

CHARLES M. TAYLOR, APPELLANT,

vs.

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFFMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MAY 26, 1905.

(19,776.)

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1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Now comes the above named plaintiff and complains of the above named defendants, and for cause of action alleges:

I.

That said plaintiff is the owner of three certain Mining Claims situate in the California Mining District, in said County, known as and called the Victor Mining Claim, the Magnet Mining Claim and the Comet Mining Claim, and the location notices of which said Mining Claims are of record in the office of the County Recorder of said County of Cochise, in Book fifteen (15) Records of Mines, at pages 78, 76 and 75, respectively, and that plaintiff is lawfully entitled to the possession of the same.

II.

That said defendants claim to have some interest in and to said Mining Claims aforesaid, and have from time to time entered upon the same and extracted ores therefrom, and have threatened
2 and do now threaten to continue so to do, against the rights of this plaintiff; but plaintiff alleges that said defendants have no right or interest whatsoever in or to said premises, and that they have entered upon the same without right, although this plaintiff is informed and believes that said defendants claim to have some right or interest in said property.

Wherefore plaintiff prays that the said defendants be required to appear and answer this complaint, and to set forth their claims in and to the said property, whatever they may be, and that upon the final hearing hereof the title of plaintiff in and to said mining claims and property aforesaid be quieted as against the said defendants and any and all persons claiming or to claim by, through or under said defendants or either of them, and that plaintiff have and recover of and from said defendants his costs herein expended.

BARNES & MARTIN,
Attorneys for Plaintiff.

(Endorsed:) No. 3161. In the District Court of the First Judicial District, County of Cochise. Charles M. Taylor, Plaintiff, *vs.* Thomas Burns, John A. Duncan and S. R. Kaufman, Defendants. Complaint. Filed April 6, 1903. Geo. B. Wilcox, Clerk.

3 In the District Court, Second Judicial District of the Territory of Arizona in and for the County of Cochise.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and the Complaint filed in the said County of Cochise, in the office of the Clerk of said District Court.

CHARLES M. TAYLOR, Plaintiff,

vs.

THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

The Territory of Arizona sends Greeting to Thomas Burns, John A. Duncan and S. R. Kaufman:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service) after the service on you of this summons, (if served within this county; otherwise within thirty days), or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 6th day of April, in the year of our
4 Lord one thousand nine hundred and three.

[SEAL.] GEO. B. WILCOX, *Clerk.*

Office of the Sheriff of the County of Pima.

I hereby certify that I received the within summons on the 7th day of April, 1903, and personally served the same on the 7th day of April, 1903, on John A. Duncan being one of the defendants named in said summons, by delivering to John A. Duncan said defendant, personally in the County of Pima a copy of said summons, and copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 7th day of April 1903.

FRANK E. MURPHY, *Sheriff.*
By E. DRACHMAN,
Deputy Sheriff.

(Endorsed:) No. 3161. District Court. First Judicial District, County of Cochise, Territory of Arizona. Charles M. Taylor, Plaintiff, *vs.* Thomas Burns *et al.*, Defendants. Summons. Filed June 19", 1903. Geo. B. Wilcox, Clerk. By C. A. Wallace, Deputy Clerk.

5 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Answer.

Come now the defendants Thomas Burns, John A. Duncan and S. R. Kaufman, and answer the complaint in the above entitled action as follows:

I.

For their first defense, defendants allege and show the Court, from the pleadings now herein on file, that the complaint of plaintiff herein is not verified.

Wherefore defendants pray judgment for want of a complaint herein, because the same is not verified, that the said complaint be dismissed, and that defendants may have their costs.

II.

For a second defense, defendants demur to the complaint herein because it appears upon the face of said complaint, that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray that said complaint be dismissed, and that defendants have and recover their costs.

6 III.

For a third and further defense to said complaint,

1. Defendants deny paragraph 1 of said complaint.

2. Defendants allege that on the 27th day of February, 1900, the defendant Thomas Burns, being a citizen of the United States, went upon the public domain of the United States, and having there made discoveries of mineral in place, proceeded to locate three mining claims which he named respectively "Magnet," "Comet" and "Victor," and upon said day posted at the Point of Discovery upon each of said claims a Notice of Location of the claim; that said mining claims are situate in the California Mining District, in the County of Cochise, Territory of Arizona; that subsequently, and within the time and in the manner prescribed by law, said defendant Burns caused the discovery, or location, or preliminary work to be done and completed upon each of said mining claims, and marked the boundaries of each of said locations; that after fully complying, as to each of said claims, with the laws of the United States and the laws of the Territory of Arizona in relation to the location of Mining Claims, said defendant caused to be made out and

recorded in the Office of the Recorder of said County of Cochise, a Notice of Location of each of said three mining claims, which notices of location described the location and boundaries of said claims respectively; that said three notices of location were so recorded on the 5th day of March, 1900; that the Location Notice of the
7 Magnet Mining Claim was so recorder in Book 15, Record of Mines, at page 76; that the Notice of Location of the Comet Mining Claim was so recorded in Book 15, Record of Mines, at page 77; and the Notice of Location of the Victor Mining Claim was so recorded in Book 15, Record of Mines, at page 78.

3. That during each of the years 1901 and 1902, said defendant Burns performed not less than $100.00 worth of labor or improvements upon each of said three Mining Claims.

4. Defendants allege that on November 9th, 1901, said defendant Burns made, executed and delivered to the defendant John A. Duncan a good and sufficient deed, conveying to said Duncan an undivided one-fourth interest of, in and to said Magnet, Comet, and Victor Mining Claims, which deed is recorded in the Recorder's Office in said Cochise County, in Book 14, Mining Deeds, at pages 302 and 303.

5. Defendants allege that on the 9th day of March, 1903, the defendants Thomas Burns and John A. Duncan entered into an agreement with S. R. Kaufman, Trustee, for the sale of said three mining claims to said Trustee, which said agreement is recorded in the Recorder's Office in said County, in Book 7, Miscellaneous Records, at page 251.

6. That said defendant Burns, ever since said date of his said location of the three mining claims above named, and said Defendant Duncan, ever since he acquired his said undivided one-fourth interest therein as aforesaid, have remained continuously in
8 possession of said three mining claims, and have had the possession, ownership and right of possesion thereto.

7. That at the commencement of this action said defendants Thomas Burns and John A. Duncan were the owners of said three mining claims, and were then and ever since have been entitled to the quiet, peaceable and exclusive possession and enjoyment thereof (subject only to the right of the defendant S. R. Kaufman, Trustee, under and pursuant to the agreement of sale aforesaid) by virtue of a full compliance on the part of said defendants with the mining laws above referred to.

Wherefore defendants pray that they be adjudged and decreed to be the owners of and entitled to the possession of said Magnet, Comet and Victor Mining Claims, as their several interests may appear, and for such other and further relief as may be deemed just and equitable in the premises, and for the costs of this action.

IV.

For a fourth and further defense, defendants allege that the cause of action stated in the complaint herein did not accrue within two years next before the commencement of this action.

Wherefore defendants pray that they be hence dismissed with costs.

HERRING & SORIN,
Attorneys for Defendants.

9 TERRITORY OF ARIZONA, *County of Pima, ss:*

William Herring, of lawful age, being first duly sworn, on his oath says: That he is one of the Attorneys of the defendants Thomas Burns, John A. Duncan and S. R. Kaufman, in this cause, and that the foregoing answer of the said defendants is true in substance and fact, as he verily believes.

WILLIAM HERRING.

Subscribed and sworn to before me this 2nd day of May, A. D., 1903.

[SEAL.] ROBERT B. PARSONS,
Notary Public in and for the County of Pima, Arizona Territory.

My Commission expires June 27th, 1906.

(Endorsed:) 3161. District Court, Second Judicial District, Cochise Co., Arizona. Charles M. Taylor, Plaintiff, *vs.* Thomas Burns, John A. Duncan and S. R. Kaufman, Defendants. Answer. Filed May 4th, 1903. Geo. B. Wilcox, Clerk. By C. A. Wallace, Dep-ty. Herring & Sorin, Attorneys for Def'ts.

10 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Amended Answer and Cross-Complaint.

Come now the defendants Thomas Burns, John A. Duncan and S. R. Kaufman, before the trial of this action, and file their amended answer to the complaint herein, as follows:

I.

For a first defense to said complaint.

1. Defendants deny the allegations contained in paragraph 1 of said complaint.

2. Defendants allege that on the 27th day of February, 1900, the defendant Thomas Burns, being a citizen of the United States, went upon the public domain of the United States, and having there made discoveries of mineral in place, proceeded to locate three mining claims which he named respectively "Magnet," "Comet" and "Vic-

tor," and upon said day posted at the Point of Discovery upon each of said claims a Notice of Location of the claim; that said mining claims are situate in the California Mining District, in the County of Cochise, Territory of Arizona; that subsequently, and within ninety days from said date of said locations, and in the manner
11 prescribed by law, said defendant Burns caused the discovery, or location, or preliminary work to be done and completed upon each of said mining claims, and marked the boundaries of each of said locations; that after fully complying, as to each of said claims, with the laws of the United States and the laws of the Territory of Arizona in relation to the location of Mining Claims, said defendant caused to be made out and recorded in the Office of the Recorder of said County of Cochise, on the 5th day of March, 1900, a Notice of Location of each of said three mining claims, which notices of location described the location and boundaries of said claims respectively; that the Location Notice of the Magnet Mining Claim was so recorded in Book 15, Record of Mines, at page 76; that the Notice of Location of the Comet Mining Claim was so recorded in Book 15, Record of Mines, at page 77; and the Notice of Location of the Victor Mining Claim was so recorded in Book 15, Record of Mines, at page 78.

3. That during each of the years 1901 and 1902, said defendant Burns performed not less than $100.00 worth of labor or improvements upon each of said three Mining Claims.

4. Defendants allege that on November 9th, 1901, said defendant Burns made, executed and delivered to the defendant John A. Duncan a good and sufficient deed, conveying to said Duncan an undivided one-fourth interest of, in and to said Magnet, Comet and Victor Mining Claims, which deed is recorded in the Recorder's Office in said Cochise County, in Book 14, Mining Deeds, at pages
12 302 and 303.

5. Defendants allege that on the 9th day of March, 1903, the defendants Thomas Burns and John A. Duncan entered into an agreement with S. R. Kaufman, Trustee, for the sale of said three mining claims to said Trustee, which said agreement is recorded in the Recorder's Office in said County, in Book 7, Miscellaneous Records, at page 251.

6. That said defendant Burns, ever since said date of his said location of the three mining claims above named, and said defendant Duncan, ever since he acquired his said undivided one-fourth interest therein as aforesaid, have remained continuously in possession of said three mining claims, and have had the possession, ownership and right of possession thereto.

7. That at the commencement of this action said defendants Thomas Burns and John A. Duncan were, and still are, the owners of said three mining claims, and were then and ever since have been and now are entitled to the quiet, peaceable and exclusive possession and enjoyment thereof (subject only to the right of the defendant S. R. Kaufman, Trustee, under and pursuant to the agreement of sale aforesaid) by virtue of said location of said mining claims by

said defendant Burns, and a full compliance on the part of said defendants with the mining laws above referred to.

Wherefore defendants pray that they be adjudged and de-
13 creed to be the owners of and entitled to the possession of said Magnet, Comet and Victor Mining Claims, as their several interests may appear, and for such other or further relief as may be deemed just and equitable in the premises, and for the costs of this action.

II.

For a second and further defense, defendants allege that the cause of action stated in the complaint herein did not accrue within two years next before the commencement of this action.

Wherefore defendants pray that they be hence dismissed with costs.

HERRING & SORIN,
Attorneys for Defendants.

TERRITORY OF ARIZONA, *County of Pima, ss:*

William Herring, of lawful age, being first duly sworn, on his oath says: That he is one of the Attorneys of the defendants Thomas Burns, John A. Duncan and S. R. Kaufman, in this cause, and that the foregoing answer of the said defendants is true in substance and fact, as he verily believes.

WILLIAM HERRING.

Subscribed and sworn to before me this 18th day of June, A. D. 1903.

(My Commission expires June 27, 1906.)

[SEAL.] ROBERT B. PARSONS,
Notary Public, Pima County, Arizona.

14 And the defendants, Thomas Burns, John A. Duncan and S. R. Kaufman, by way of cross-complaint against the plaintiff, Charles M. Taylor, allege:

1.

That prior to the commencement of the above entitled action, the defendants Thomas Burns and John A. Duncan, were, and still are the owners (subject only to the paramount title of the United States), and in the possession of the following described mining claims and premises, situate in the California Mining District, in the County of Cochise and Territory of Arizona, to-wit: The Magnet Mining Claim, the Notice of Location of which claim is recorded in the office of the County Recorder of said County, in Book 15, Record of Mines, at page 76; the Comet Mining Claim, the Notice of Location of which claim is recorded in the office of said County Recorder, in Book 15, Record of Mines, at page 77; the Victor Mining Claim, the Notice of Location of which claim is recorded in the office of said County Recorder, in Book 15, Record of Mines, at page 78.

2.

Defendants allege that on the 27th day of February, 1900, the defendant Thomas Burns, being a citizen of the United States, went upon the public domain of the United States, and having there made discoveries of mineral in place, proceeded to locate the three mining claims above referred to, which he named respectively Magnet, Comet and Victor, and upon said day posted at the Point of
15 Discovery upon each of said claims a Notice of Location of the claim; that subsequently, and within ninety days from said date of said locations, and in the manner prescribed by law, said defendant Burns caused the discovery or location or preliminary work to be done and completed upon each of said mining claims, and duly marked the boundaries thereof; that after fully complying, as to each of said claims, with the laws of the United States and the laws of the Territory of Arizona in relation to the location of Mining Claims, said defendant caused to be made out and recorded, in the Office of the Recorder of Cochise County, on the 5th day of March, 1900, a Notice of Location of each of said three mining claims, which notices of location described the location and boundaries of said claims respectively, and which are the Notice of Location hereinbefore referred to.

3.

That during each of the years 1901 and 1902, said defendant Burns performed not less than $100.00 worth of labor or improvements upon each of said three Mining claims.

4.

Defendants allege that on November 9th, 1901, said defendant Burns made, executed and delivered to the defendant John A. Duncan a good and sufficient deed, conveying to said Duncan an undivided one-fourth interest of, in and to said Magnet, Comet and Victor Mining Claims, which deed is recorded in the Recorder's Office in said Cochise County, in Book 14, Mining Deeds, at
16 pages 302 and 303.

5.

Defendants allege that on the 9th day of March, 1903, the defendants Thomas Burns and John A. Duncan entered into an agreement with S. R. Kaufman, Trustee, for the sale of said three mining claims to said Trustee, which said agreement is recorded in the Recorder's Office in said County, in Book 7, Miscellaneous Records, at page 251.

6.

That said defendant Burns, ever since said date of his said location of the three mining claims above named, and said defendant Duncan, ever since he acquired his said undivided one-fourth interest therein as aforesaid, have remained continuously in possession of said three mining claims, and have had the possession, ownership and right of possession thereto.

7.

That at the commencement of said action, said defendants Thomas Burns and John A. Duncan were, and still are, entitled to the ownership and the quiet, peaceable and exclusive possession and enjoyment of said three mining claims (subject only to the right of the defendant S. R. Kaufman, as Trustee, under and pursuant to the agreement of sale aforesaid), by virtue of said location thereof by said defendant Burns, and a full compliance on the part of said defendants with the mining laws above referred to.

17 8.

That defendants are credibly informed and believe that said plaintiff, Charles M. Taylor, makes some claim to said mining claims adverse to these defendants.

9.

That the claim of said Charles M. Taylor to the premises above described is without any right whatever, and that said Taylor has no right, title or interest or estate whatever in or to said premises, or any part thereof.

Wherefore defendants pray that the plaintiff may be required to set forth the nature of his claim to the premises hereinabove described, and that the controversy between the said parties, and their respective claims to said premises, may be decided by this Honorable Court; that a decree may be made and entered herein, establishing defendants' estate in said premises, and declaring and adjudging that the plaintiff has no estate or interest whatever in said premises or any part thereof, and that the defendants are the owners of and entitled to the possession of said Magnet, Comet and Victor Mining Claims, as their several interests may appear; and that plaintiff be barred and forever estopped from having or claiming any right or title to the said premises adverse to these defendants; and for such other and further relief as may be deemed just and equitable in the premises, and for the costs of this action.

HERRING & SORIN,
Attorneys for Defendants.

18 TERRITORY OF ARIZONA, *County of Pima, ss:*

William Herring, of lawful age, being first duly sworn, on oath says: That he is one of the Attorneys of the defendants Thomas Burns, John A. Duncan and S. R. Kaufman, in this cause, and that the foregoing Cross Complaint of the said defendants is true in substance and fact, as he verily believes.

WILLIAM HERRING.

Subscribed and sworn to before me this 18th day of June, A. D. 1903.

(My Commission expires June 27, 1906.)

[SEAL.] ROBERT B. PARSONS,
Notary Public, Pima County, Ariz.

(Endorsed) No. 3161. In the District Court, Second Judicial District, Cochise County, Arizona. Charles M. Taylor, Plaintiff, *vs.* Thomas Burns, John A. Duncan and S. R. Kaufman, Defendants. Amended Answer and Cross Complaint. Filed Jun. 19, 1903. Geo. B. Wilcox, Clerk Dist. Court. Herring & Sorin, Attorneys for Defendants.

19 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County Cochise.

CHAS. M. TAYLOR, Plaintiff,

vs.

THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Answer to Defendants' Cross-complaint.

Now comes the plaintiff, Charles M. Taylor, by his attorney, W. H. Barnes, and by way of answer to the cross-complaint herein, defends and says:

I.

That he admits subdivision 2 Amended Cross Complaint Filed June 19th, 1903, herein; he also admits subdivision 3 of same: He admits subdivision 4 of same, but alleges that said deed from the said Burnes to the said Duncan is subject to the rights of the plaintiff herein, as hereinafter alleged. Defendant admits subdivision 5 of same, but alleges that the contract between the said Burnes and Duncan and Kaufman was subject to the rights of the plaintiff herein. Defendant denies subdivision 6 of same; and denies subdivision 7 of same.

And further answering defendants said cross-complaint, plaintiff alleges that on, viz, the 26th day of March, A. D. 1901, the said Thomas Burnes made, executed and delivered to the
20 plaintiff a certain deed conveying the Magnet, Comet, and Victor Mining Claims to the said plaintiff, which said deed is in the words and figures following, to-wit: "This memorandum of agreement, made and entered into this 26th day of March, A D., 1901, by and between Thomas Burnes (a widower) of Cochise County, Arizona, the party of the First part and Charles M. Taylor of Tucson, Arizona, the party of the Second part, witnesseth:—

That the said party of the First Part in consideration of the Sum of One Dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim, situate in the California Mining District, in the Chiracahua Mountains, Cochise County, Arizona Territory, sells to the said party of the sec-

ond part the said mining claims upon the terms and conditions following, to-wit:

The said party of the Second part shall pay to the *the* party of the First part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars ($45,000.00) and in addition thereto one-eighth (1/8) of whatever price the said party of the Second part may be able to sell, place or negotiate the said mines, for a consideration in ex-
21 cess of said $45,000.00; that is to say the party of the Second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000.00, and may retain out of said purchase price seven-eighths (7/8) of said selling price above such sum of $45,000.00.

The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the First part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same.

This contract is to take the place of and supercede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

In witness whereof the said parties have hereunto set their hands this twenty-sixth day of March, A. D. 1901.

Executed in duplicate.

(S'd) THOS. BURNES.
(S'd) C. M. TAYLOR.

Which said deed was duly acknowledged on said date as aforesaid. And the said deed was recorded in the Recorder's Office of the said County of Cochise, on the 15th day of December, 1902, in Book 6 of Miscellaneous Records, at pages 474-5-6. Under which said
22 deed the said Burnes conveyed to the said plaintiff the said Mining claims for good and valuable consideration, upon the terms and conditions of the said deed, and that thereby the said plaintiff became the owner of the said Mining Claims subject to the payment of forty-five thousand dollars, to be paid by the said plaintiff to the said Burnes whenever he should sell the said Mining Claims, and in addition thereto one-eighth of whatever price he might sell the said property for over and above the said forty-five thousand dollars: That the said plaintiff is willing and anxious to carry out and execute the said contract and to pay to the said Burns the said amount of money if & whenever the plaintiff shall sell the said mining claims according to the terms of said contract.

Wherefore he prays that the cross-complaint may be dismissed at the cost of the defendants, and that plaintiff be declared to be the owner of the property mentioned in the said cross-complaint according to the terms of said contract, and against the rights of the said Burnes and his co-defendants, and all persons claiming by through or under him; and for such other relief as the law allows.

W. H. BARNES,
Attorney for Plaintiff.

TERRITORY OF ARIZONA, *County of Pima, ss:*

William H. Barnes, of lawful age, being first duly sworn, on his oath says: That he is attorney for the plaintiff
23 herein, Charles M. Taylor, and that the foregoing answer is true in substance and in fact, as he verily believes.

W. H. BARNES.

Subscribed and sworn to before me this 19th day of June, A. D., 1903.

[SEAL.] R. W. LANGWORTHY,
Notary Public, Pima County, Arizona.

My commission expires Sept. 24th, 1906.

No. 3161. In the District Court, — Judicial District, — County Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Answer to Cross Complaint. Recd. June 19, 1903 a copy of the within Answer to Cross Complaint. Herring & Sorin. Filed June 20, 1903. Geo. B. Wilcox, Clerk Dist. Court. By C. A. Wallace, Depty.

24 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFFMAN, Defendants.

Findings.

This cause being regularly upon the calendar at this June, A. D., 1903, Term of said Court, and having been regularly reached in its order for trial, plaintiff appearing by his attorneys, Barnes & Martin, and D. L. Cunningham, and defendants appearing by their attorneys, Herring & Sorin, and a trial by jury having been expressly waived by the attorneys for the respective parties, and the trial of said cause having duly proceeded before said Court, and witnesses having been duly sworn and examined in behalf of plaintiff and defendants, and the Court having heard the proofs of the respective parties, and having duly considered the same, and the records and papers in the cause, and the cause having been finally submitted to the Court for its decision, the Court now finds the following facts:

I.

That on the 27th day of February, 1900, the defendant Thomas Burns, being a citizen of the United States, went upon the
25 public domain of the United States, and having there made discoveries of mineral in place, proceeded to locate the three mining claims described in the complaint and in defendants' cross-

complaint herein, and upon said day posted at the Point of Discovery upon each of said claims a Notice of Location of the claim; that subsequently, and within ninety days from said date of said location, said defendant Burns caused the discovery work to be done and completed upon each of said mining claims and marked the boundaries thereof; that thereafter said defendant caused to be made out and recorded in the Office of the Recorder of Cochise County, on the 5th day of March, 1900, a Notice of Location of each of said three mining claims, which notices of location described the location and boundaries of said claims respectively, and which are the Notices of Location mentioned and referred to in the complaint and cross-complaint.

II.

That said Magnet, Comet and Victor Mining Claims are situate in the California Mining District, in the County of Cochise and Territory of Arizona.

III.

That during each of the years 1901 and 1902, said defendant Burns performed not less than one hundred dollars worth of labor or improvements upon each of said three Mining Claims.

IV.

That on November 9th, 1901, defendant Burns made, exe-
26 cuted and delivered to the defendant John A. Duncan a deed conveying to said Duncan an undivided one-fourth interest of, in and to the said Magnet, Comet and Victor mining claims, which deed was recorded in the Recorder's Office in said Cochise County on November 25, 1901, in Book 14, Mining Deeds, at pages 302 and 303; that at the date and delivery of said deed said Duncan had no knowledge of the instrument set forth in plaintiff's answer to defendants' cross-complaint.

V.

That on the 9th day of March, 1903, the defendants Thomas Burns and John A. Duncan entered into an agreement with the defendant S. R. Kaufman, Trustee, for the sale of said three mining claims to said defendant Kaufman, Trustee, which agreement was recorded in the Recorder's Office in said County on March 11th, 1903, in Book 7, Miscellaneous Records, at page 251.

VI.

That defendant Thomas Burns, ever since said twenty-seventh day of February, 1900, and defendant John A. Duncan, ever since said ninth day of November, 1901, have remained continuously in possession of said three mining claims.

VII.

That on March 26th, 1901, the defendant Thomas Burns and the plaintiff Charles M. Taylor made, executed and delivered the instru-

ment set forth in plaintiff's answer to defendants' cross-complaint,
which instrument was recorded in the office of the Recorder
27 of said Cochise County on the 15th day of December, 1902,
in Book 6, Miscellaneous Records, at pages 474, 475 and 476.

Conclusions of Law.

As Conclusions of Law from the foregoing facts the Court now hereby finds and decides:

I.

That the defendants Thomas Burns and John A. Duncan are the owners, subject only to the paramount title of the United States, and in the possession of and entitled to the possession of the said Magnet, Comet and Victor mining claims described in said complaint and in defendants' cross-complaint, as against the plaintiff and all persons claiming or to claim the same or any part thereof under or through him, the said plaintiff, and that said plaintiff has no estate, right, or title in or to the said mining claims or either of them; that said ownership, possession and right or possession of said defendants Thomas Burns and John A. Duncan of, in and to said mining claims is as follows, to-wit: the said Thomas Burns is the owner of, in the possession of and entitled to the possession of an undivided three-fourths interest of, in and to said three mining claims, and said defendant John A. Duncan is the owner of, in the possession of and entitled to the possession of an undivided one-fourth interest of, in
and to said three mining claims; that the said interests of said
28 defendants Thomas Burns and John A. Duncan are subject
to the provisions and conditions set forth in the agreement of March 9th, 1903, between said defendants Thomas Burns and John A. Duncan and said defendant S. R. Kaufman, Trustee.

II.

That the instrument set forth in plaintiff's answer to defendants' cross-complaint was and is without force or effect to vest in plaintiff any estate, right, or title in or to the said Magnet, Comet or Victor mining claims.

III.

That the defendants are entitled to a decree in favor of defendants and against the plaintiff as prayed for in defendants' cross-complaint to quiet their title to said mining claims and premises against said plaintiff and all persons claiming or to claim the same or any part thereof under or through the said plaintiff, and declaring and adjudging that the plaintiff has no estate, right, or title in or to said mining claims or either of them; and that defendants Thomas Burns and John A. Duncan are the owners of and entitled to the possession of said Magnet, Comet and Victor mining claims, in the following interests, to-wit: the said defendant Thomas Burns an undivided three-fourths interest therein, and the said defendant John A. Duncan to an undivided one-fourth interest therein, subject to the pro-

visions and conditions set forth in the agreement of March 9th, 1903, between said defendants Thomas Burns and John A. Duncan
29 and said defendant S. R. Kaufman, Trustee; and that plaintiff be barred and forever estopped from having or claiming any right or title to the said mining claims and premises adverse to these defendants; and that defendants have and recover their costs of this action.

And judgment is hereby ordered to be entered accordingly. Done in open Court this 30th day of June, A. D., 1903.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) District Court, Cochise County. Chas. M. Taylor *vs.* Thomas Burns, *et al.* Findings. Filed June 30, 1903. Geo. B. Wilcox, Clerk. Herring & Sorin.

30 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Decree.

This cause having been regulary called and tried by the court and the findings of fact and conclusions of law and the decision thereon in writing, having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of Thomas Burns, John A. Duncan and S. R. Kaufman, defendants, against Charles M. Taylor, plaintiff.

It is now, therefore, hereby ordered, adjudged and decreed, that defendants have judgment as prayed for in their answer and cross-complaint, against plaintiff; that all adverse claims of the plaintiff, and all persons claiming or to claim under him to the said premises, or any part thereof, are hereby adjudged and decreed to be invalid and without any right whatever; and that defendants Thomas Burns and John A. Duncan be, and they hereby are, declared and adjudged to be the true and lawful owners of and entitled to the possession of said premises described in said complaint and
31 cross-complaint, and hereinafter described and every part and parcel thereof, in the following proportions and interests: namely; the said defendant Thomas Burns, of an undivided three fourths interest in said premises; the said John A. Duncan of an undivided one fourth interest in said premises; which said interests are, however declared to be subject only to the provisions and conditions set forth in a certain agreement made between the said Thomas Burns and John A. Duncan, and the said S. R. Kaufman, Trustee, dated March 9th, A. D., 1903, and recorded in the office of the County Recorder of the County of Cochise March 11th A. D., 1903, in Book 7 of Miscellaneous Records, pages 251-3.

And the title of said defendants Thomas Burns and John A. Dun-

can to said premises is hereby adjudged to be quieted against all claims, demands or pretentions of said plaintiff Charles M. Taylor who is hereby barred and forever estopped from having or claiming any right or title to said premises or any part thereof adverse to said defendants. Said premises are described as follows, to-wit: Magnet Mining Claim, Comet Mining Claim, Victor Mining Claim, situate in the California Mining District, in the County of Cochise, in the Territory of Arizona, the notices of location of which claims are recorded in the office of the County Recorder of Cochise County, as follows: to-wit:—Magnet Mining Claim in Book 15 Record of Mines, at page 76; Comet Mining Claim in Book 15, Record of Mines, at page 77; Victor Mining Claim in Book 15, Record of Mines, at page 78.

32 And it is hereby further ordered, adjudged and decreed that Defendants have and recover of and from the plaintiff their costs of this action amounting to four 55/100 Dollars.

Dated June 30th A. D., 1903.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) In the District Court, Second Judicial District, Cochise County. Charles M. Taylor *vs.* Thomas Burns, *et al.* Decree. Filed June 30, 1903. Geo. B. Wilcox, Clerk. Herring & Sorin, attys.

33 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,

vs.

THOS. BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Notice of Motion for New Trial.

Notice is hereby given that plaintiff will file a motion for a new trial in the above entitle- cause upon the general grounds that the Court erred in admitting evidence over plaintiff's objection; and the Court erred in rejecting evidence offered by the plaintiff on the trial of the cause, and that the evidence admitted on the trial of the cause does not sustain the judgment rendered. Of which take due notice.

BARNES & MARTIN,
D. L. CUNNINGHAM,
Attorneys for Plaintiff.

To Thos. Burns, John A. Duncan and S. R. Kaufman, Defendants, or Messrs. Herring & Sorin, Defendants' Attorneys.

34 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOS. BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Motion for New Trial.

Now Comes the Plaintiff in the above entitled action and moves the Court to set aside the judgment therein rendered and grant the plaintiff a new trial of said cause, and for grounds of motion the plaintiff alleges:

I.

That the Court erred in admitting evidence oved Plaintiff's objection.

II.

That the Court erred in rejecting evidence offered by Plaintiff.

III.

That the evidence admitted on the trial of the cause does not sustain the judgment rendered.

Wherefore, plaintiff prays that the judgment be set aside and a new trial be granted plaintiff.

BARNES & MARTIN,
D. L. CUNNINGHAM,
Attorneys for Plaintiff.

35 (Endorsed:) No. 3161. District Court of the 2nd Judicial Dist. of Arizona in & for Cochise County. Chas. M. Taylor, Plaintiff *vs.* Thos. Burns, John A. Duncan & S. R. Kaufman, Defendants. Notice and motion for new trial. Original. Served July 1st, 1903, Herring & Sorin, Attys. for Defts. Filed July 1, 1903. Geo. B. Wilcox, Clerk.

36 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHAS. M. TAYLOR, Plaintiff,
against
THOMAS BURNS ET AL., Defendants.

I, the undersigned Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 4 of said Court, at page 234. And I further certify

that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of the District Court, this 30th day of June, A. D., 1903.

[SEAL.] GEO. B. WILCOX, *Clerk.*

(Endorsed:) No. 3161. District Court of the 2nd Judicial District of the Territory of Arizona, County of Cochise. Chas. M. Taylor, Plaintiff, *vs.* Thomas Burns, *et al.*, Defendants. Judgment Roll. Filed June 30th, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Judgment Roll. Filed October 23, 1903, S. M. Cullom, Clerk.

37 This memorandum of an agreement, made and entered into this 26th day of March A. D. 1901, by and between Thomas Burns (a widower) of Cochise County, Arizona, the party of the first part and Charles M. Taylor of Tucson, Arizona, the party of the second part, witnesseth:—

That the said party of the first part in consideration of the sum of One Dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet mining claim and the Victor mining claim, situate in the California Mining District, in the Chiracahua mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and conditions following, to-wit:

The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, Forty-five Thousand Dollars ($45,000.00) and in addition thereto one-eights (1/8) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of the said $45,000.00; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000.00, and may retain out of said purchase price
38 seven-eight-s (7/8) of said selling price above such sum of $45,000.00.

The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of the said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same.

This contract is to take the place of and supercede any and all other contract or contracts heretofore made by the said parties hereto, with reference to said mining claims.

In witness whereof the said parties have hereunto set their hands this twenty sixth day of March A. D., 1901.

Executed in duplicate.

THOS. BURNS.
C. M. TAYLOR.

TERRITORY OF ARIZONA, *Pima County, ss:*

Before me John H. Martin a Notary Public in and for Pima County, Arizona Territory on this day personally appeared Thomas Burns and Charles M. Taylor the parties whose names are subscribed to the foregoing instrument, known to me to be the same parties who executed the same and acknowledged to me that they executed the same for the purpose and consideration therein ex-
39 pressed.

Given under my hand and official seal this 26th day of March A. D., 1901.

JOHN H. MARTIN,
[SEAL.] *Notary Public, Pima County, Arizona.*

My commission expires 3/31/1903.

(Endorsed:) 3161. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 3161. Plaintiff's Exhibit "A" C. I. McReynolds, Official Reporter. Recorder's Office, Tombstone, Cochise Co., Ariz. Filed and recorded at request of Chas. M. Taylor, Dec. 15, 1902, A. D. 190–, at 9 A. M. Book 6 Miss. Records. Pages 474-5-6 Frank Hare, County Recorder. Pd. Phoenix, A. T. No. 840. In the Supreme Court, of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Plaintiff's Ex "A." Filed October 23, 1903. S. M. Cullom, Clerk.

40 Know all men by these presents: That we, Walter D. Beuhring and Charles M. Taylor, of the City of Tucson, County of Pima, and Territory of Arizona, in consideration of the sum of one dollar ($1.00) to us in hand paid by Thomas Burns of the County of Cochise, Territory of Arizona, receipt whereof is hereby acknowledged have forever released and discharged, and by these presents forever release and discharge the said Thomas Burns, his executors, administrators, and assigns, from all claims, rights, liens, charges, debts, dues, demands, suits, legal or equitable, and judgments, from the beginning of the world to the date of these presents, which we, in any manner, own, have, hold or claim against the said Thomas S. Burns, for or on account of, or in any manner in relation to, the following described mining premises and property situate in the California Mining District, in the said County of Cochise, and territory of Arizona, known, located and recorded in the office of the County Recorder of the County of Cochise, as follows, to-wit:

Henly, Maddox and Ray, and also Mars, located April 1st, 1900, the certificate of location whereof is of record in Book 15 Records of Mines, at page 80.

Ajax, located April 1, 1900, the certificate of location whereof is of record in Book 15 Record of Mines, at page 82.

Comet, located February 27, 1900, the certificate of location whereof, is of record in book 15, Record of Mines, at page 77.

Magnet, located February 27, 1900, the certificate of loca-
41 tion whereof is of record in Book 15, Records of Mines, at page 76.

Victor, located February 27, 1900, the certificate of location whereof, is of record in book 15, Records of Mines, at page 78.

Atlas, located February 27th, 1900, the certificate of location whereof is of record in Book 15 Records of Mines, at page 75.

Venlure, located ——, the certificate of location whereof is of record in book —, Records of Mines, at page —.

In Witness Whereof, we have hereunto set our hands and seals this 26th day of March A. D., 1901.

WALTER D. BEUHRING. [SEAL.]
CHARLES M. TAYLOR. [SEAL.]

TERRITORY OF ARIZONA, *County of Pima, ss:*

Before me, ——, a Notary Public in and for said County of Pima, on this day personally appeared Walter D. Beuhring and Charles M. Taylor known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 26th day of March A. D., 1901.

(I. R. Stamp 10 cts.) W. H. CULVER,
[SEAL.] *Notary Public, Pima County, Arizona.*

(My commission expires February 11th 1901.)

Filed and recorded at request of Wm. Herring April 5th A. D. 1901, at 3 P. M. Book 5 pages 348-9, Miss. Records.

42 TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, Frank Hare County Recorder in and for said County, hereby certify that I have compared the foregoing copy with the original agreement, Walter D. Benhring and Charles M. Taylor with Thomas Burns, filed and recorded in my office on the 5th day of April, 1901, in Book 5 Miss. Records, Pages 348-9, and that the same is a full, true and correct copy of such original and of the whole thereof.

Witness my hand and seal of office, this 15th day of December 1902.

FRANK HARE,
[SEAL.] *County Recorder.*

(Endorsed:) No. 3161. Plaintiff's offered Exhibit "B." C. I. McReynolds, Official Reporter. Ruled out. Filed June 30, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Plaintiff's offered Exhibit "B." Ruled out. Filed October 23, 1903. S. M. Cullom, Clerk.

43 SAN SIMON, ARI., *Feb. 23rd*, '03.

Chas. M. Taylor, Esq., Phoenix, Ari.

MY DEAR SIR: I omitted to mention in my letter to you of the 27th from Tucson,that the legal assesssment work was not done on the Magnet, Comet & Victor Mining Claims & some others in the California Mining District, Cochise County, Territory of Arizona, for the year 1902 and that they have been relocated as abandoned claims by John A. Duncan, a citizen of the United States.

I am yours truly, THOMAS BURNS.

No. 3161. Plaintiff's Exhibit "B". C. I. McReynolds, Official Reporter.

(Endorsed:) 3161. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Plaintiff's Ex. "B". Filed October 23, 1903. S. M. Cullom, Clerk.

(Envelope endorsed:) No. 3161. Plaintiff's Exhibit "B". C. I. McReynolds, Official Reporter. Exvelope containing letter which is also marked "B". Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Plaintiff's Ex. "B". Filed October 23, 1903. S. M. Cullom, Clerk.

44 TUCSON, ARI., *Mar.* 25, 1901.

I hereby appoint Charles M. Taylor as my agent in all matters pertaining to the Mining property owned by me & all other property owned by me.

THOS. BURNS.

Witness,
W. D. BEUHRING.

(Endorsed:) Offered & Ruled out. No. 3161. Plaintiff's Exhibit "C" C. I. McReynolds, Official Reporter. 3161. Filed June 30, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Plaintiff's Ex. "C" Filed October 23, 1903. S. M. Cullom, Clerk.

45 *Power of Attorney.*

(50 cent I. R. Stamp.)

Special.

Know all men by these presents, That I, Thomas Burns residing in the County of Cochise, Territory of Arizona, have made, constituted and by these presents do hereby make, constitute and appoint Charles M. Taylor my true and lawful Attorney for me and in my name, place and stead, to negotiate, sell and dispose of all my interest in and to those two certain mining claims situated in the California

Mining District Cochise County, Territory of Arizona, known and designated as the "Ajax" and "Mars" mining claims, and of record in the Recorder's Office of Cochise County, Arizona, and to act for me in reference to my contract with Epes Randolph dated March 12, 1900.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand, the eleventh day of May, one thousand nine hundred.

THOS. BURNS. [SEAL.]

Signed, sealed and delivered in the presence of
W. H. LEAHY.

46 TERRITORY OF NEW MEX., *County of Grant, ss:*

Before me, F. M. Witherspoon, a Notary Public in and for the County of Grant, Territory of New Mex., on this day personally appeared Thos. Burnes known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 11 day of May A. D., 1900.

[SEAL.] F. M. WITHERSPOON,
Notary Public.

My Commission expires —— ——

(Endorsed:) No. 3161. Power of Attorney. Special. From —— —— to —— —— Dated ——. Filed and recorded at request of C. M. Taylor M'c'h 2nd, A. D., 1901 at 9 A. M. Book 2 Powers of Attorney. Pages 546. Frank Hare. County Recorder. No. 3161. Plaintiff's Exhibit "D" Offered and ruled out. C. I. McReynolds, Official Reporter. Filed June 30, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thos. Burns, *et al.* Plaintiff's Ex. "D" offered and ruled out. Filed October 23, 1903, S. M. Cullom, Clerk.

47 SAN SIMON, ARI., *Dec.* 22, '02.

DEAR TAYLOR: I am in receipt of your favor wherein you speak of Riordan & Ex Gov. Wolsey. In reply will say I met Mr. Riordan under auspices that were superior to Ex Gov. Wolsey with all due deference to the Ex Gov. recent position as Gov.—I don't know what to say but this of Gent Electric they want the impossible in the way of a copper mine, they have had two Good properties presented to them & their experts reported them favorably,—Smith when leaving

me said he was going to examine one that was three thousand feet wide & two miles long somewhere North-west of Tucson. I mentioned that perhaps that would be better than Copper Queen, Jerome, &c—I read a letter from Cummings to Mac which he has sent you, it is mixing Mac up. Mac has had a chance to look after the white work, I have not. Mac has been acting with the best intentions & will pay for the work himself. I have not & Mac has not been able to ascertain how much work has — done. If you can get any parties to take hold I will render any assistance I can a nice Group can be made up. W. A. Haggott is now Lieut. Gov. of Colorado & President of a Bank with a capital of $100,000.00 I met him a few days ago—I expect to spend Christmas in camp & go out tomorrow. Wishing you the Compliments of the season,

I am yours, THOMAS BURNS.

Kind regards to Mrs. T.

48 (Endorsed:) No. 3161. Plaintiff's Exhibit "E" Offered and ruled out. C. I. McReynolds, Official Reporter. Filed June 30, 1903. Geo. B. Wilcox, Clerk. No. 840. Plt. Ex. "E." In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Filed October 23, 1903. S. M. Cullom, Clerk.

49 PHOENIX, ARIZONA, *Feb.* 23, 1903.

Captain Thos. Burns, San Simon, Arizona.

DEAR CAPT:—You will find enclosed a copy of the paper which you gave me when we bonded *our claims* to Haggott in March 1901. *This paper was good at the time you signed it, and it is just as good now as when you first gave it to me,* although you have told me it was of no good, which was either through your ignorance of law or a wish to fool me, which one of the reasons I don't care, as I have always known it was good, and to satisfy myself still farther and to be dead sure that I am right, I have consulted several lawyers, who have also pronounced it of the same value as it was when it was first given. You can get a certified copy of it at the Recorder's Office in Tombstone, Cochise Co., Arizona, in case you think that I have not given you an exact copy.

My object in sending you this copy, is to point out to you just what my rights are with the three claims, viz: Magnet, Victor and Comet claims, as you have not kept me posted as to your plans, or what you are trying to do with these claims, nor your relation with Mr. Duncan, which it is your duty to do so, as you will see from the paper where I have underlined the places, which bear on this subject, and I will quote that part, "the said parties hereto mutually agree to aid each other in the negotiation and sale of the said mining claims, to the end that the same may be sold and the consideration real-
50 ized as quickly as possible."

I have written you several times, asking you to keep me posted and to advise me what is going on, as I had parties who were ready to come out to look at the property, and had written to me

about the claims, but I have always had to tell them, that you had some parties on the string, so I could hold them off as long as possible, as I could not get any satisfaction from you in any way, but thought I would worry along with the way you were acting, as I have never cared to fall out with you, *are* any one else, as long as I could help it, and I hope we won't do so now, but this has run along, long enough, for you have put me off for over a year, and you are just as far from making a deal now as when you were a year ago. You have had plenty of time to do something with the claims, but have not, and now I have some people who are willing to examine these three claims (which I have an unlimited option on, as the enclosed paper will show you), but I have never cared to *interfer-* with you, and have given you plenty of time to make a deal, and unless you have some people who are going to do business right away, why I am going to bring these people out to look at these claims, viz, Magnet, Victor and Comet, but bear in mind that I wish to get along with you, and not have any trouble whatsoever, but the matter has run along far enough and something has got to be done. I will wait for an answer from you, before I will do any thing, say 10 days from the date of this letter.

51 I feel sure that I can make a deal with the whole group if you will be reasonable with me, but if you don't want me to try to sell the claims which I have no option on, why so good, but I am determined to bond the three which I have an option on to the first party that come- along who means business, and will bond for more than $45,000.00, which will leave me a fair profit, after the $45,000.00 has been paid to you.

I hope you are well and that you will have some good news to write me, as to a quick sale, for we have waited long enough, and will be in our graves if this kind of business continues much longer.

We are all well and send regards.

I am yours very truly,

CHARLES M. TAYLOR.

P. O. Box, 518.

(Endorsed:) No. 3161. Defendants' Exhibit 1. C. I. McReynolds, Official Reporter. 3161. Letter Feb. 23, 1903, C. M. Taylor to Thos. Burns. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Defendants' Ex. 1. Filed October 23, 1903. S. M. Cullom, Clerk.

52 Know All Men by These Presents: That, whereas, on the 26th day of March, A. D. 1901, the following authorization to Charles M. Taylor, then of Tucson, Arizona, to sell, negotiate or place the Magnet mining claim, the Comet mining claim and the Victor mining claim, all situate in the California Mining District in the Chiricahua Mountains, Cochise County, Arizona Territory, was made by Thomas Burns of said County and territory, to-wit: This memorandum of an agreement made and entered into this 26th day of March, A. D. 1901, by and between Thomas Burns (a widower) of

Cochise county, Arizona, the party of the first part, and Charles M. Taylor of Tucson, Arizona, the party of the second part, witnesseth: That the said party of the first part, in consideration of the sum of one dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim and the Victor mining claim, situate in the California Mining District in the Chiricahua Mountains, Cochise county, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and conditions following, to-wit: The said party of the second part shall pay to the party of the first part whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part Forty Five Thousand Dollars ($45,000.) and in addition thereto one eighth (⅛) of what-
53 ever price the said party of the second part may be able to sell, place or negotiate the said mines for a consideration in excess of the said $45,000; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000 and may retain out of said purchase price seven eighths (⅞) of said selling price above such sum of $45,000. The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of the said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same. This contract is to take the place of and supersede any and all contract or contracts heretofore made by the said parties hereto with reference to said mining claims.

In witness whereof the said parties have hereunto set their hands this 26th day of March, A. D. 1901. Executed in duplicate. Thos. Burns, C. M. Taylor. Territory of Arizona, Pima County, ss. Before me, John H. Martin, a Notary Public in and for Pima County, Arizona Territory, on this day personally appeared Thomas Burns and Charles M. Taylor the parties whose names are subscribed to the foregoing instrument known to me to be the same parties who exe-
54 cuted the same and acknowledged to me that they executed the same for the purpose and consideration therein expressed. Given under my hand and official seal this 26th day of March, A. D., 1901. John H. Martin, Notary Public, Pima County, Arizona. My commission expires 3/31/1903. (SEAL.)

And whereas the said Charles M. Taylor since said authorization to sell, negotiate or place said mines has wholly failed to expend any labor upon the said Magnet, Comet and Victor mining claims or in or upon either of said claims and has wholly failed and neglected to negotiate, sell or place said mines or either of them:

Now, therefore, the authorization to the said Charles M. Taylor mentioned and referred to in said agreement, to sell and negotiate the said mines and every of them is hereby withdrawn, revoked, canceled and annulled.

In witness whereof the said Thomas Burns has hereunto set his hand, this 27th day of February, A. D. 1903.

THOMAS BURNS.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Before me, Nellie R. Conger, a Notary Public in and for the county of Pima, Territory of Arizona, on this day personally appeared Thomas Burns, whose name is subscribed to the foregoing instrument as a party thereto, known to me to be the same person who executed said instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

55 Given under my hand and official seal this 27th day of February, A. D. 1903.

[SEAL.]

My commission expires Sept. 30, 1905.

NELLIE R. CONGER,
Notary Public, Pima County, Arizona.

(Endorsed:) Revocation of Authorization of C. M. Taylor to Sell by Thomas Burns. Recorder's Office, Tombstone, Cochise Co., Ariz. Filed and recorded at request of Thos. Burns, Feb'y 28, A. D. 1903, at 9 A. M. Book 7 Miss. Records. Pages 241-244. Frank Hare, County Recorder. Pd. San Simon. No. 3161. Defendants Exhibit "2." C. I. McReynolds, Official Reporter. 3161. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Defendants Ex. 2. Filed October 23, 1903. S. M. Cullom, Clerk.

56 TUCSON, ARIZONA, *February* 28, 1903.

Chas. M. Taylor, Esq., Phœnix, Arizona.

DEAR SIR: Please find enclosed a copy of an instrument which I have caused to be recorded in the office of the County Recorder of Cochise County, Arizona, by which instrument I have revoked, canceled and annulled the authorization heretofore given to you to negotiate, sell or place the Magnet, Comet and Victor mining claims, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory; and you are hereby notified that I do revoke, cancel and annul such authorization.

You can get a certified copy of this instrument at the Recorder's office in Tombstone, Cochise County, Arizona, in case you think that I have not given you an exact copy.

Yours very truly, THOMAS BURNS.

(Endorsed:) No. 3161. Defendant's Exhibit Part of "2" C. I. McReynolds, Official Reporter. Letter which accompanied Exhibit "2" Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thos. Burns, *et al.* Defendants Ex. Part of 2. Filed October 23, 1903. S. M. Cullom, Clerk.

57 *Notice of Location.*

(2 5 cent I. R. Stamps.)

Notice is hereby given that, in accordance with the laws of Congress and the laws of the Territory of Arizona, there has been located by the undersigned, on the 27 day of February, 1900, the following described lead, lode, or vein of mineral bearing earth, rock or quartz and premises situate in the California Mining district, in the County of Cochise, in the Territory of Arizona, to-wit:

The name of the claim is Magnet, the length of the lode is 1500 feet; the name of the locator is Thos. Burns; the width of said claim is 300 feet on each side of the middle of said lead, lode or vein; the length of said claim is 1500 feet; the number of feet claimed on the N. Westerly side of the center of the discovery shaft to the N. Westerly end center monument of the claim is 175; the number of feet claimed on the South Easterly side of the center of said discovery shaft to the South Easterly end center monument of the claim is 1325.

The general course of said lode is North Westerly & South Easterly.

Said claim is bounded and described as follows: Beginning at the monument of stones placed at the discovery shaft upon said claim where notice of location is posted; North-Westerly 175 feet to a monument of stones, being the center of the North Westerly end of the claim; thence South Westerly, 300 feet to a monument of
58 stones, being the North-Westerly corner of the claim; thence S. Easterly along the Westerly side line of the claim 750 feet to a monument of stones, being the center of the Westerly side line; thence again S. Easterly along said Westerly side lines 750 feet to a monument of stones, being the South Westerly corner of the claim; thence N. Easterly 300 feet to a monument of stones, being the center of the South Easterly end of the claim; thence again N. Easterly 300 feet to a monument of stones, being the South Easterly corner of the claim; thence North Westerly along the Easterly side line of the claim 750 feet to a monument of stones, being the center of the Easterly side line of the claim; thence again North Westerly 750 feet to a monument of stones, being the North Easterly corner of the claim; thence S. Westerly 300 feet to the monument of stones, being the center of the North Westerly end of the claim.

In order to identify said claim, it is more particularly described as follows, to-wit: is about 1½ miles Westerly from U. S. Mineral Monument and adjoins the Victor Mining Claim on its South Easterly end and in Jus. Cañon.

THOS. BURNS, *Locator.*

Witnesses:
G. T. COLVIN.
JIM BENNETT.

Dated the 27 day of February, 1900.

59 (Endorsed:) Recorder's Office, Tombstone, Cochise Co., A. T. Filed and recorded at request of Thos. Burns, Mar. 5, A. D. 1900, at 9 A. M. Book 15 of Records of Mines, page 76. Frank Hare, County Recorder. By Lee O. Woolery, Deputy. No. 3161. Defendants Exhibit "3" C. I. McReynolds, Official Reporter. 3161. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Defendants Ex. 3. Filed October 23, 1903. S. M. Cullom, Clerk.

60 *Notice of Location.*

(2 5 cent I. R. Stamps.)

Notice is hereby given that, in accordance with the laws of Congress and the laws of the Territory of Arizona, there has been located by the undersigned, on the 27 day of February, 1900, the following described lead, lode, or vein of mineral bearing earth, rock or quartz and premises situate in the California Mining District, in the County of Cochise, in the Territory of Arizona, to-wit:

The name of the claim is Comet; the length of the lode is 1500 feet; the name of the locator is Thos. Burns; the width of said claim is 300 feet on each side of the middle of said lead, lode or vein; the length of said claim is 1500 feet; the number of feet claimed on the N. Westerly side of the center of the discovery shaft to the N. Westerly end center monument of the claim is 300; the number of feet claimed on the South Easterly side of the center of said discovery shaft to the South Easterly end center monument of the claim is 1200.

The general course of said lode is North Westerly and South Easterly.

Said claim *in* bounded and described as follows: Beginning at the monument of stones placed at the discovery shaft upon said claim where notice of location is posted; thence N. Westerly 300 feet to a monument of stones, being the center of the North Westerly end of the claim; thence South Westerly 300 feet to a monument of
61 stones, being the N. Westerly corner of the claim; thence S. Easterly along the Westerly side line of the claim 750 feet to a monument of stones, being the center of the Westerly side line; thence again S. Easterly along said Westerly side line 750 feet to a monument of stones, being the South Westerly corner of the claim; thence North Easterly 300 feet to a monument of stones, being the center of the S. Easterly end of the claim; thence again N. Easterly 300 feet to a monument of stones, being the South Easterly corner of the claim; thence North Westerly along the Easterly side line of the claim 750 feet to a monument of stones, being the center of the Easterly side line of the claim; thence again N. Westerly 750 Feet to a monument of stones, being the North Easterly corner of the claim, thence South Westerly 300 feet to the monument of stones, being the center of the North Westerly end of the claim.

In order to identify said claim, it is more particularly described as

follows, to-wit: is about 1¼ miles Westerly from U. S. Mineral Monument and lies paralel/ to the Magnet Mining Claim on its Easterly side of it.

THOS. BURNS, *Locator.*

Witnesses:
G. T. COLVIN.
JIM BENNETT.

Dated the 27 day of February, 1900.

62 (Endorsed:) Recorder's Office, Tombstone, Cochise Co., A. T. Filed and recorded at request of Thos. Burns. Mar. 5, A. D. 1903, at 9 A. M. Book 15 Records of Mines. Pages 77. Frank Hare, County Recorder. By Lee O. Woolery, Deputy. No. 3161. Defendant's Exhibit "4" C. I. McReynolds, Official Reporter. 3161. Filed June 27, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Defendant's Ex. 4. Filed October 23, 1903. S. M. Cullom, Clerk.

63 THE TERRITORY OF ARIZONA, *County of Cochise, ss:*

Know all men by these presents:—That I Thomas Burns, of said County and Territory, for and in consideration of the sum of One ($1.00) Dollar, and for other valuable considerations to me in hand paid by John A. Duncan, of St. Joseph, Missouri, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said John A. Duncan, of the County of Buchanan State of Missouri, the following described property:—

One undivided one-fourth (¼th) interest in and to the following mining claims, located in the California Mining District, in the County of Cochise, and Territory of Arizona, to-wit: The Mars, Ajax, Comet, Magnet, Victor, Vixen, Venture, Atlas, Henly, Maddox, Ray and Center.

To have and to hold the above described one-fourth of the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said John A. Duncan, his heirs and assigns, and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said John A. Duncan, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand, this 9 day of November, 1901.

THOMAS BURNS.

64 THE TERRITORY OF ARIZONA, *County of Cochise:*

Before me, E. F. Kelsey, a Notary Public, in and for Cochise County, Territory of Arizona, on this day personally appeared Thomas Burns, to me known to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he

executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 9th day of November, 1901.

[SEAL.] E. F. KELSEY,
Notary Public.

My commission expires Nov. 22, 1904.

(Endorsed:) Thomas Burns to John A. Duncan. Deed. Recorder's Office, Tombstone, Cochise Co., A. T. Filed and recorded at request of Jno. A. Duncan Nov. 25, A. D. 1901, at 1 P. M. Book 14 Deeds Mines, pages 302-303. Frank Hare County Recorder. No. 3161. Defendant's Exhibit "5" for identification. C. I. McReynolds, Official Reporter. Filed June 30, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thos. Burns, *et al.* Defendants' Ex. 5, for identification. Filed October 23, 1903. S. M. Cullom, Clerk.

65 (10 cts. I. R. stamps, cancelled.)

Notice of Location.

Notice is hereby given, that in accordance with the laws of Congress and the laws of the Territory of Arizona, there has been located by the undersigned, on the 27 day of February, 1900, the following described lead, lode, or vein of mineral bearing earth, rock or quartz and premises situate in the California Mining District, in the County of Cochise, in the Territory of Arizona, to-wit:—

The name of the claim is Victor; the length of the lode is 1500 feet; the name of the locator is Thos. Burns; the width of said claim is 300 feet on each side of the middle of said lead, lode or vein; the length of said claim is 1500 feet; the number of feet claimed on the N. Westerly side of the center of the discovery shaft to the N. Westerly end center monument of the claim is 400; the number of feet claimed on the South Westerly side of the center of said discovery shaft to the South Easterly end center monument of the claim is 1100.

The general course of said lode is North Westerly & South Easterly.

Said claim is bounded and described as follows: Beginning at the monument of stones placed at the discovery shaft upon said claim where notice of location is posted; thence N. Westerly, 400 feet to a monument of stones, being the center of the North Westerly
66 end of the claim; thence South Westerly, 300 feet to a monument of stones, being the North Westerly corner of the claim; thence south Easterly along the Westerly side line of the claim 750 feet to a monument of stones, being the center of the Westerly side line; thence again S. Easterly along said Westerly side line 750 feet to a monument of stones, being the South Westerly corner of the claim; thence N. Easterly 300 feet to a monument of stones, being

the center of the South Easterly end of the claim; thence again N. Easterly 300 feet to a monument of stones, being the South Easterly corner of the claim; thence North Westerly along the Easterly side line of the claim 750 feet to a monument of stones, being the center of the Easterly side line of the claim; thence again North Westerly 750 feet to a monument of stones being the North Easterly corner of the claim; thence South Westerly 300 feet to the monument of stones, being the center of the North Westerly end of the claim.

In order to identify said claim, it is more particularly described as follows, to-wit:—is about 1½ Miles Westerly of U. S. Monument and adjoins the Magnet Mining claim on its Northerly End and in Jus. Canon.

THOS. BURNS, *Locator.*

Witnesses:
JIM BENNETT.
G. T. COLVIN.

Dated the — day of ——, 1900.

67 Endorsed: Victor 23—3161. Filed June 27" 1903, Geo. B. Wilcox, Clerk. No. 3161. Defendant's Exhibit "5" C. I. McReynolds, Official Reporter. Recorder's Office, Tombstone, Cochise Co., A. T. Filed and recorded at request of Thos. Burns, Mch. 5 A. D. 1900 at 9 A. M. Book 15 Records of M. Pages 78. Frank Hare, County Recorder.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, County of Cochise, hereby certify the above to be, a full, true and correct copy of the Location Notice of the Victor Mining Claim, and the endorsements thereon.

Witness my hand and the seal of the above Court, this 10th day of September, 1903.

GEO. B. WILCOX, *Clerk.*

(Endorsed:) 3161. Certified Copy Defendant's Exhibit "5" Substituted for original and filed by order of Court Sept. 10, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Certified Copy Defendant's Ex. 5. Filed October 23, 1903. S. M. Cullom, Clerk.

68 Memorandum of Agreement this day made between Thomas Burns, of San Simon, Cochise County, Territory of Arizona, and John A. Duncan, of St. Joseph, Buchanan County, State of Missouri, party of the first part, and S. R. Kaufman, Trustee, party of the second part, Witnesseth: That for and in consideration of the sum of One Dollar ($1.) in hand paid by the party of the second part to the said party of the first part the receipt whereof is hereby acknowledged, and of other valuable considerations, the said party of the first part hath covenanted and agreed, and by these presents

doth covenant and agree, to sell, grant and convey by a good and sufficient deed to the said S. R. Kaufman, Trustee, the following named mining claims, situate in the California Mining District, County of Cochise, Territory of Arizona, the location certificates of which are recorded in the office of the County Recorder of said Cochise County, as follows, to-wit:

Venture, recorded in Book 15, Record of Mines, at page 273;
Oak, recorded in Book 15, Record of Mines, at page 385-386;
x *Victor,* recorded in Book 15, Records of Mines, at page 78;
Ray, recorded in Book 15, Records of Mines, at page 270;
x *Magnet,* recorded in Book 15, Records of Mines, at page 76;
x *Comet,* recorded in Book 15, Records of Mines, at page 75;
Henly, recorded in Book 15, Records of Mines, at page 269;
Maddox, recorded in Book 15, Records of Mines, at page 271;
Ajax, recorded in Book 15, Records of Mines, at pages 82 and 83;
Mars, recorded in Book 15, Records of Mines, at pages 80 and 81;

69 Old Pick, recorded in Book 15, Records of Mines, at page 217;

Neptune, recorded Book 23, Records of Mines, at page 340;
Sunshine, recorded Book 23, Records of Mines, at page 342;
Navarre, recorded in Book 23, records of Mines, at page 339;
Diamond, recorded in Book 21, records of Mines, at page 303;
Midland, recorded Book 23, Record of Mines, at page 337;
Scotland, recorded Book 23, Record of Mines, at page 343;
Bowen, recorded Book 23, Records of Mines, at page 334;
Fairhaven, recorded Book 23, Records of Mines, at page 336;
Planet, recorded Book 23, Records of Mines, at page 341;
Mercury, recorded in Book 23; Records of Mines, at page 338; and
Friday, recorded in Book 23, Records of Mines, at page 335; at any time within two years after the 6th day of March A. D. 1903, upon the terms, covenants and conditions set forth in an escrow agreement, deposited on the 9th day of March A. D. 1903, with the Consolidated National Bank of Tucson, Arizona. This agreement terminates absolutely in two years from said 6th day of March A. D. 1903, if the rights of purchase set forth in said escrow are not by that time exercised.

In Witness Whereof the parties hereto have hereunto set their hands this 9th day of March A. D. 1903.

THOMAS BURNS,
JOHN A. DUNCAN,
S. R. KAUFMAN, *Trustee.*

70 TERRITORY OF ARIZONA, *County of Pima, ss:*

Before me, Nellie R. Conger, a Notary Public in and for the County of Pima, Territory of Arizona, on this day appeared Thomas Burns, John A. Duncan and S. R. Kaufman, Trustee, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 9th day of March A. D. 1903.

My Commission expires Sept. 30, 1905.

[SEAL.] NELLIE R. CONGER,
Notary Public.

Filed and recorded at request of Hereford & Hazzard Mch. 11th 1903, at 9 A. M. Book 7 Miss. Records, Cochise County, Arizona Territory.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, Frank Hare, County Recorder in and for said County, hereby certify that I have compared the foregoing copy with the original agreement between Thos. Burns, John A. Duncan and S. R. Kaufman, Trustee, filed and recorded in my office on the 11th day of March 1903, in Book 7, Miscellaneous Record, at pages 251-2-3, and that the same is a full, true and correct copy of such original and of the whole thereof.

Witness my hand and seal of office, this 17th day of March, 1903.

[SEAL.] FRANK HARE,
County Recorder.

71 (Endorsed:) No. 3161. Defendants' Exhibit for identification "6" C. I. McReynolds, Official Reporter. 3161. Filed June 30, 1903, Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns *et al.* Defendants' Exhibit for identification "6." Filed October 23, 1903, S. M. Cullom, Clerk.

72 In the District Court, First Judicial District of the Territory of Arizona in and for the County of Cochise.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JOHN A. DUNCAN and S. R. KAUFMAN, Defendants.

Memorandum of Costs and Disbursements.

Disbursements.

Clerk's fees $4.55

TERRITORY OF ARIZONA, *County of Cochise, ss:*

William Herring being duly sworn deposes and says: That he is one of the attorneys for the defendants in the above entitled action, and, as such is better informed relative to the above costs and disbursements than the said defendants, that the items in the above

memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

WILLIAM HERRING.

Subscribed and sworn to before me this 1st day of July, 1903.
[SEAL.] GEO. B. WILCOX, *Clerk.*

(Endorsed:) No.——. In the District Court, First Judicial District, County of Cochise, Territory of Arizona. Chas. M. Taylor, Plaintiff *vs.* Thomas Burns, *et al.* Defendants. Memorandum of Costs and Disbursements. Filed July 1st, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs* Thos. Burns, *et al.* Memorandum of Costs and Disbursements. Filed October 23, 1903. S. M. Cullom, Clerk.

73 In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

No. 3161.

CHARLES M. TAYLOR, Plaintiff,
vs.
THOMAS BURNS, JNO. A. DUNCAN and S. R. KAUFMAN, Defendants.

Application to Withdraw File Papers.

To the Hon. Fletcher M. Doan, Judge of said Court:

Your applicants, defendants in the above entitled cause, ask leave to withdraw from the files of the above entitled cause, the original location notice of the Victor Mining Claim, filed by them, upon leaving with the clerk of said court a duly certified copy thereof to be substituted for said original.

And applicants further ask, that if said leave be granted, an order be made by the court directing the clerk in the premises accordingly.

HERRING & SORIN,
Attorneys for Applicants.

In Chambers.

TOMBSTONE, ARIZONA, *September* 9, 1903.

Upon reading the foregoing application it is ordered that same be granted and that the clerk of said court, upon presentation to him of a duly certified copy of said original location notice of the Victor Mining Claim, deliver said original location notice to
74 applicants and file said certified copy in lieu thereof in the files of said cause.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) 3161. Charles M. Taylor *v.* Thomas Burns, *et al.* Application to Withdraw File Papers. Filed Sept. 10, 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Application to withdraw file papers. Filed October 23, 1903. S. M. Cullom, Clerk.

75 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHAS. L. TAYLOR, Plaintiff,
vs.
THOS. BURNS ET AL., Defendants.

Know all men by these presents that We, Chas. L. Taylor, as principal, and Epes Randolph and H. B. Tenney, as sureties, are firmly held and bound unto Thomas Burns in the penal sum of Five Hundred Dollars ($500.00), for payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents:

Witness our hands and seals this 28″ day of September, A. D., 1903.

CHAS. L. TAYLOR, [SEAL.]
By W. H. BARNES.
EPES RANDOLPH. [SEAL.]
H. B. TENNEY. [SEAL.]

The condition of the above undertaking is such: That whereas on the 28″ of September, A. D. 1903, the said defendant duly recovered a judgment in the said Court, against the said Charles L. Taylor, to quiet title in and to the land in the complaint therein described, and whereas: The said Charles L. Taylor is desirous of ap-
76 pealing from the judgment and decision of the said District Court to the Supreme Court of the Territory of Arizona:

Now therefore: if the said Charles L. Taylor shall prosecute his appeal to effect, and shall fully pay off, satisfy and perform the judgment rendered against him on said appeal, then this obligation shall be null and void, otherwise to remain in full force and virtue.

CHARLES L. TAYLOR, *Principal,*
By W. H. BARNES.
EPES RANDOLPH, *Surety.*
H. B. TENNEY, *Surety.*

TERRITORY OF ARIZONA, *County of Cochise, ss:*

Epes Randolph and H. B. Tenney, the sureties in the within undertaking, being duly sworn, say each for himself and not for the other, that he is worth the sum of Five Hundred Dollars, over and above all his debts and liabilities, exclusive of property exempt from execution, and that he is a resident and free holder within the Territory of Arizona.

EPES RANDOLPH.
H. B. TENNEY.

Subscribed and sworn to before me this 28 day of Sept. A. D., 1903.

RALPH W. LANGWORTHY,
[SEAL.] *Notary Public.*

My Commission Expires Sept. 24, 1906.

77 (Endorsed:) 3161. In the District Court of the Second Judicial District, County of Cochise. Charles M. Taylor, Plaintiff *vs.* Thomas Burns, *et al.*, Defendant-. Bond on Appeal. Approved and Filed Sept. 29", 1903. Geo. B. Wilcox, Clerk. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor *vs.* Thos. Burns, *et al.* Bond on Appeal. Filed October 23, 1903, S. M. Cullom, Clerk.

78 *Index to Witnesses.*

	Direct.	Cross-examination.
Witnesses on the part of the Plaintiff.		
Thomas Burns	4 (82)	5 (83)
Plaintiff rests	9 (87)	
Witnesses on the part of the defendants.		
Thomas Burns	9 (87)	15 (93) (96)
Jno. A. Duncan	40 (118)	41 (119)
Defendants rest	50 (128)	
Rebuttal on the part of the plaintiff.		
Charles M. Taylor	50 (128)	61 (139)
Case submitted	63 (141)	

Index to Exhibits.

Exhibits on the part of the plaintiff.	
Exhibit "A"	2 (80)
Exhibit "B"	17 (95)
Exhibit "C"	35 (113)
Exhibit "D"	37 (115)
Exhibit "E"	38 (116)
Exhibits on the part of the defendants.	
Exhibit 1	7 (85)
Exhibit 2	9 (87)
Exhibit 3	15 (93)
Exhibit 4	15 (93)
Exhibit 5	15 (93)
Admission of Plaintiff offered in evidence	42 (120)
Deed from Burns to Duncan, marked Exhibit 5 for identification	45 (123)
Memorandum between Burns & Duncan and Kaufman, Trustee, marked Exhibit 6 for identification	47 (125)

79 Pleadings read.

By Mr. BARNES: Plaintiff will offer in evidence the following paper (Hands paper to opposing counsel). That is the paper referred to in the answer.

By Mr. HERRING: To the introduction of which paper or instrument defendant objects on the ground that it is immaterial and inadmissable under the pleadings and does not tend to prove any issue made by the pleadings. There is another objection which we desire to present to the introduction of this instrument, that this instrument which it is alleged is the deed in question, by its date appears to have been made at a time when the laws of the United States required that a revenue stamp should be upon such instrument and that without that revenue stamp it is inadmissable in evidence for any purpose.

Argument.

By the COURT: In other words, you urge the absence of the revenue stamps as affecting its weight and sufficiency as evidence of a transfer of title.

Argument.

By the COURT: Allow me to ask if this argument that is being made is not intended to go to the weight and effect of the instrument rather than to its admissability. Plaintiff must show what his claim and title to the property is. Now he offers this paper in evidence as tending to show what his title to the property is.

80 Argument.

By the COURT: What is the date of that instrument?

By Mrs. SORIN: The date of this instruemnt, Your Honor, is the 26th day of March, 1901.

By Mr. BARNES: Please mark this Plaintiff's Exhibit "A".

Hands paper to the reporter, who thereupon marks the same Plaintiff's Exhibit "A".

By the COURT: Upon what point are you offering that paper?

By Mr. BARNES: To show our title to the premises; to show that the defendant Burns conveyed this property to the plaintiff and that the property is his, subject only to the conditions in that conveyance.

Argument.

By Mr. HERRING: We renew our objection to the offer.

By the COURT: I would feel inclined to sustain the objection to the introduction of the instrument in support of the complaint alone if the case was being tried on the complaint and the answer; I feel inclined to sustain the objection. But as we are trying this case it is in rather peculiar shape, looking at it in view of the cases in which I have had this question come up, because in their answer defendants plead the statute of limitations, and then there is a cross-complaint put in by the defendants wherein, after setting up their title they allege that they are credibly informed and believe that

81 said plaintiff, Charles M. Taylor, makes some claim to said mining claims adverse to these defendants; that the claim of said Charles M. Taylor to the premises above described is without any right whatever and that said Taylor has no right, title or interest or estate whatever * * * Wherefore defendants pray that the

plaintiff may be required to set forth the nature of his claim to the premises hereinabove described and that the controversy between the said parties * * * may be decided by this Court. Now it occurs to me that under that prayer in the cross-complaint that this party would be entitled to show what claim of right, title or interest in the property he has, and it occurs to me that that would render this instrument eligible as evidence for what it may be worth.

By Mr. HERRING: Now if Your Honor will allow us a moment on the rule of code pleading.

By the COURT: Very well.

Argument.

By Mr. BARNES: Now we offer this to show that we have the interest marked by that paper.

Argument.

By the COURT: It will be admitted in evidence for what it may be worth.

By Mr. BARNES: Now we offer that document, the endorsements and acknowledgement and all, and with that offer we rest.

By the COURT: I will say in regard to this, I am not just
82 clear at the present time as to the rule of evidence invoked as to the exclusion of this exhibit, but I am perfectly clear as to one point, that is, I shall not consider it in evidence as a conveyance of title. It may be evidence in the case to show some interest in the property; it may occur that what may afterwards develop in the case may show some title or right that the plaintiff has, but the Court will not construe that instrument to be a deed or a conveyance of title, that is all.

By Mr. BARNES: The Court will construe it to be what it is.

By the COURT: Yes, as an agreement between the parties; there may some right grow from it. I will see how that develops.

By Mr. HERRING: With that qualification it may go in.

By Mr. BARNES: I will call Mr. Burns.

THOMAS BURNS, called as a witness on behalf of the plaintiff and first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. Are you the Thomas Burns who is a defendant in this case?
A. I can't hear, sir.
Q. Are you the Thomas Burns who is a defendant in this case?
A. I am, sir.
Q. Do you know Mr. Duncan?
A. Capt. John A. Duncan?
Q. I believe that is the gentleman, yes sir.
A. Yes, I know him very well, sir.
83 Q. You have stated in your answer, or your counsel for you, with your knowledge, I presume, that you have conveyed an undivided one-fourth interest in this property to Mr. Duncan.
A. Yes sir.

Q. Did you at any time before you did that tell him of this contract with Taylor?
A. No sir.
Q. Never did tell him?
A. No sir, not before.
Q. You kept that from him?
A. Not intentionally.
Q. Well, did you intend to tell him?
A. Certainly.
Q. You did intend to tell him?
A. Certainly I intended to tell him.
Q. Well, did you tell him?
A. Certainly I told him.
Q. That is all.

Cross-examination by Mr. HERRING:

Q. You told him after the conveyance?
A. After the conveyance, yes sir.
Q. That is all at present.

By Mr. BARNES: How long after?

A. That was March. About ten or eleven months after I signed that agreement with Taylor.
84 Q. How long after you conveyed it to Duncan?
A. Oh! a few months.
Q. Two months?
A. I can't tell the exact time in months.
Q. How did you happen to tell him then?
A. I was telling him about the property—I told him about that along in—it was some time afterwards; it was in 1902 when I told him about this agreement with Taylor.
Q. Why didn't you tell him when you took his money?

By Mr. HERRING: Object to that as immaterial and not tending to establish any issue in the case, and incompetent.
By Mrs. SORIN: It is irrelevant.
By the COURT: Objection sustained.
By Mr. BARNES: That is all.
By Mr. HERRING: That is all, Captain, for the present.
By Mr. BARNES: I find that I will have to abandon my claim against Mr. Duncan. I am satisfied that I can't prove his actual knowledge. I thought I could by Mr. Burns but I find that I can't do it.
By the COURT: You dismiss as to Duncan?
By Mr. BARNES: No, I won't dismiss. I will leave it as it is. I will say that I don't dispute his right to an undivided one-fourth interest.
By Mr. HERRING: As part of our cross-examination I will go in a little further. He has asked about this instrument.
By the COURT: Very well.
85 By Mr. HERRING: You were asked about when you told about this instrument you made with Taylor, this agreement you made with Taylor, when you told Duncan.

A. Yes sir.
Q. Have you had any correspondence with Taylor about that agreement?
A. No sir.
Q. Did you get any letter from him about it—from Taylor?
A. Yes sir.
Q. Produce it. (Witness produces a letter.)
Q. Do you know whose signature it is on this paper?
A. Yes sir.
Q. Whose is it?
A. Charles M. Taylor's.
Q. From whom did you receive this?
A. From Charles M. Taylor.
Q. Through what course—the mail?
A. Through the mail, yes sir.
Q. The United States mail?
A. Yes sir.

By Mr. BARNES: We have no objection to that paper.
By Mr. HERRING: We offer this paper in evidence and ask to have it marked Defendants' Exhibit No. 1. on cross-examination of the witness Burns.

By Mr. BARNES: Well, that's our case.

86 By Mr. HERRING: Hold on, we are not through with this witness yet. Capt. Burns, you heard the offer here of an instrument by counsel for the plaintiff as the agreement of the 26th day of March between you and Taylor.

A. Yes sir.
Q. Now will you state whether at any time subsequent to the 26th day of March, 1901, you ever revoked this instrument, this authority?
A. Yes sir.

By Mr. BARNES: We object to that. I put this witness on the witness-stand for one purpose only, and they cannot go beyond that.
Argument.
By Mr. HERRING: Now we offer this instrument as part of the cross-examination of this witness, Your Honor, in relation to the agreement referred to by counsel for the plaintiff, and submit the paper to Your Honor.
By Mr. BARNES: That paper which you offered I didn't object to.
By Mr. HERRING: This is the revocation of that.
By Mr. BARNES: Oh! Now, if the Court please, we put him on the stand to show that Mr. Duncan was not an innocent purchaser, and when I asked him if he notified Mr. Duncan of that agreement he said he didn't and that ended it.
Argument.

By Mr. HERRING: Now I will withdraw the offer of this
87 paper at this time.

By the COURT: Very well.
By Mr. HERRING: Now, Captain, did you want to make any explanation why you didn't tell Capt. Duncan?

A. Yes sir, I'd like to.

By Mr. BARNES: I object to any reason why.

A. I'd like to very much.

By Mr. BARNES: This is purely a question whether Mr. Duncan took it as an innocent purchaser.

By Mr. HERRING: Very well, that's not a material point. Now then it is the understanding that this offer as to the cross-examination of this witness is withdraw. Now I understand the counsel for the plaintiff to rest.

By Mr. BARNES: We rest.

By Mr. HERRING: Very well. Now we call Thomas Burns as a witness for defendants.

THOMAS BURNS, called as a witness in behalf of the defendants, having already been sworn, testified as follows:

Direct examination, by Mr. HERRING:

Q. I will ask you to look at this paper and state whether that is your signature. (Hands paper to witness.)

A. Yes sir, that is my signature.

Q. We wish this marked now Defendants' Exhibit No. 2 and offer it in evidence. We will offer this in evidence now.

By Mr. BARNES: We object to it as irrelevant and immaterial, and that a party can't revoke a contract by his own act.

88

By Mr. HERRING: I submit it to the Court without argument.

By Mr. BARNES: We deny that a party can make a contract and then revoke it by his own act.

Argument.

By Mr. HERRING: Mark this as the paper accompanying it. (Handing letter to the reporter.)

By the COURT: Let it go in evidence for what it may be worth. I can't tell now what the effect of it is.

Thereupon the papers referred to were marked as Defendants' Exhibit 2 and letter accompanying said Exhibit 2.

By Mr. BARNES: We admit that we got that; that the plaintiff received that.

By Mr. HERRING: You admit that you got Exhibit 2 and the letter accompanying it?

By Mr. BARNES: We admit receiving that inside of an envelope by mail with Exhibit 2; it came to us by mail about that date.

By Mrs. SORIN: Your Honor, I would like to ask Judge Barnes if he will admit—Judge, you admit that the record in your answer to the cross-complaint referred to in—let me get the correct references.

By Mr. BARNES: I am going to change the references in my answer. At the time I received that I hadn't received the other, but I will get the references correct. But as far as the possession

goes, I will admiit that they are in possession of the prop-
89 erty.

By Mrs. SORIN: Your Honor, we desire to offer in evidence for defendants the admission of counsel for the plaintiff that we are in possession, because that is denied by the pleadings.

By the COURT: Very well.

By Mrs. SORIN: Let the record show that.

By Mr. BARNES: We don't admit that you are legally in possession. You are on the ground.

By the COURT: You admit the actual fact, not the legal effect of it.

By Mr. BARNES: Yes, that is it.

By Mrs. SORIN: We want that admission in the record.

By Mr. BARNES: We don't make any admission in the record.

By Mrs. SORIN: Your Honor, I submit that when an attorney makes an admission in open Court the other side may offer it in evidence.

Argument.

By the COURT: Did I understand the counsel for plaintiff to admit that the defendants are in possession, actually in possession of the property?

By Mr. BARNES: I admit just what is in our pleadings.

By Mrs. SORIN: You deny it in your pleading.

By Mr. BARNES: Well, I admit what is in our pleadings. The only admission I make is what they say.

By the COURT: The only question before the Court is this:
90 whether counsel for the plaintiff desires the court reporter to make a notation in the evidence that the plaintiff admits that the defendants are actually in possession of the property or whether they will have to go ahead and prove it.

By Mr. BARNES: I don't admit anything except what is in my pleadings. I think the pleadings do say that.

Argument.

By Mr. BARNES: I make no admissions except what is in the pleadings. I admit subdivision two of paragraph three, subdivision three of paragraph three, subdivision four of paragraph three, and I admit subdivision five of paragraph three, and that is all I do admit.

By Mrs. SORIN: Your Honor, I just want to ask if that is in the record.

By the COURT: I don't know. We can ask the reporter and see.

By the REPORTER: Yes sir, I have the admissions in the record.

By Mr. BARNES: Well, that shouldn't be in the record; it was not meant for the record and he had no business to put it in the record. I often admit things in Court I don't stand by.

By Mrs. SORIN: That's Judge Barnes.

By the COURT: Very well, then, the reporter evidently has it. That is, he has the withdrawal of it as well as the admissions. It is incumbent upon the defendants to prove the possession.

Argument.

91 By the COURT: I would say for the information of counsel for the defendants that that is already in the record, and the withdrawal is also there.

By Mr. HERRING: Captain, how long have you been out in the Territory this last time?

A. I located that ground the eleventh day of — or along in November.

Q. I didn't ask you that. I asked you how long you have been out in camp there in the Chiricahuas.

A. Well, about ten years, sir.

Q. Where these mines are located?

A. Yes sir.

Q. Where the Magnet, Victor and Comet are located?

A. Yes sir.

Q. Now after the location of those mines and since their location up to the present time who has been in possession of those mines?

A. I have, up to the last few months, and since then some other parties are in possession.

Q. Well, it is just the same thing; you put some parties in to work there?

A. Yes sir, I put them in to work there.

Q. The possession is still your possession?

A. Yes sir, my possession.

Q. Of those claims?

92 A. Yes sir.

Q. Have you those location notices of the Magnet, Comet and Victor mining claims?

A. Yes sir.

Q. Produce them. I want to fix the date of those locations. You have those? (Witness produces notices).

Q. We propose to offer these, Judge Barnes, and have them marked.

By Mr. BARNES: All right, those are the same ones referred to in your pleadings?

By Mrs. SORIN: Yes sir, those are the original ones.

By Mr. HERRING: Now mark those Defendants' Exhibits 3, 4, and 5. We offer these in evidence, Your Honor—the three location notices of these claims.

By the COURT: Very well.

By Mr. HERRING: Captain, the date stated in those papers is the twenty seventh day of——

A. Yes sir, that is the date on which we made them.

Q. —of February, 1900.

A. That was the date of the locations, yes sir.

Q. And have you been in possession since that date?

A. Yes sir.

Q. Of those three claims?

A. Yes sir.

Q. Continuously?

A. Yes sir.

93 By Mr. HERRING: These are now admitted in evidence, Mr. Stenographer.

Thereupon the same were marked as Defendants' Exhibits 3, 4 and 5.

By Mr. HERRING: I think you had better amend your answer now.

By Mrs. SORIN: Subdivision two of paragraph three of the answer is changed to read subdivision two of amended cross-complaint filed June 19th, 1903; subdivision three of said paragraph three is changed to subdivision three of same; subdivision four of said paragraph three is changed to read subdivision four of same; subdivision five of said paragraph three is changed to read subdivision five of same; subdivision six of said paragraph three is changed to read subdivision six of same; and subdivision seven of said paragraph three is changed to read subdivision seven of same. These changes are in Paragraph one of plaintiff's answer to defendants' cross-complaint, so that those admissions and denials will refer to the proper places in the pleadings.

By Mr. HERRING: Those location notices are offered for all purposes for which they are applicable in evidence. That is all now, Captain. Any questions, Judge.

By Mr. BARNES: Yes.

Cross-examination.

By Mr. BARNES:

Q. Mr. Burns, did you sign that and mail it? (Handing paper to the witness).

94 *Q.* There is your signature. You can see that.

A. I want to read it first. (examines paper). Yes, I signed that.

Q. And mailed it in that envelope?

A. Yes sir.

By Mr. HERRING: Well, we shall object to this as not cross-examination, not tending to elicit any information in relation to any matter upon which the defendant has been examined in chief.

By Mr. BARNES: I will show it to your Honor. That is four days before he says he revoked that.

By Mr. HERRING: Now I submit, Your Honor, that this is irrelevant and incompetent and does not tend to bring out any matter on which he *has* examined in chief, and it is not cross-examination.

By the COURT: It is subject to that objection at this time, yes sir.

By Mr. BARNES: Now, if Your Honor please, it is competent cross-examination. They have put him on the witness-stand and he has testified that he sent that document which is offered in evidence which they call a revocation of the contract four days before that letter. I say it is a very material fact and it is competent in cross-examination.

Argument.

By Mr. HERRING: Well now, we say in relation to this paper that notwithstanding those facts alleged that it would shed no

95 light upon any of the issues in the case and it is objected to on the ground that it is irrelevant and incompetent for that

reason. It sheds no light and is not material to any issue in this case. There is another ground why that should not be admitted and that is that counsel has already admitted that the assessment work was done this year and now he offers testimony to contradict that.

Argument.

By Mr. HERRING: We will stand upon our objection that it is not cross-examination in any sense and not admissable on that ground.

By the COURT: Ordinarily it would not be admissable, and I think the Court ruled it was not on cross-examination ordinarily, but the witness on the stand being one of the parties it is competent for counsel to make use of him if he desires so to do, and while not strictly admissable at this time it will save time to let it in now. Objection overruled.

By Mr. HERRING: We want an exception noted to that.

By Mr. BARNES: Have this marked Exhibit 'B.'

Thereupon the same was marked Plaintiff's Exhibit 'B.'

By Mr. HERRING: It is now past six o'clock, Your Honor. Shall we take an adjournment now or go on for thirty minutes.

By the COURT: I think we might adjourn now until later in the evening or until early Monday morning.

Adjourned until Monday, June 30th.

96 MONDAY, *June 30th*—10.45 A. M.

By the COURT: Are the parties ready in the case of Taylor against Burns?

By Mr. HERRING: We are ready for the defendants.

THOMAS BURNS, one of the defendants, re-called for further cross-examination, testified as follows:

Cross-examination by Mr. BARNES:

Q. Mr. Burns, these claims sued about in this case were located in 1900, I understand?

By Mr. HERRING: Well, the evidence as to the location of the claims is already admitted and it is in.

By Mr. BARNES: I am not contradicting it. I am just asking when it was.

By Mr. HERRING: I object to the question because it is not cross-examination.

By the COURT: It is a preliminary question; the question may be answered.

By Mr. BARNES: These claims were located in 1900, is that correct?

A. Yes sir.

Q. What part of the year?

A. In February.

Q. And was Charles M. Taylor on the ground during that year?

By Mr. HERRING: Object to it as immaterial and irrelevant and not coss-examination.

97 By Mrs. SORIN: And upon the further ground that the location of the mines and the location work and the annual work is admitted in the pleadings.

By Mr. BARNES: I am not disputing the location work or the annual work. I want to know whether Charles M. Taylor was on the ground in 1900.

By Mr. HERRING: That is objected to as immaterial and irrelevant. I don't care if two hundred Taylors were there.

By the COURT: Let me see the location notices.

(The Court examines the location notices.)

Argument.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Was there any other contract besides the one which has been testified about executed on the date of the one that is in this case—any paper signed by you or anybody and delivered to you?

A. What is the question, sir?

Q. Was any other paper besides this one signed that day and delivered to you?

By Mr. HERRING: Signed by who?

By Mr. BARNES: Any of the parties, you or Charles M. Taylor?

A. Yes, I signed a release—No, I didn't sign a release then.

By Mr. HERRING: You signed a release?

A. No, I didn't sign any paper that day but that one, that

98 I know of.

By Mr. BARNES: Is this paper a copy of the paper that you signed on that day? (Hands a paper to the witness.)

By Mr. HERRING: We object to that question as to whether that paper was signed on that day or not. It is immaterial and irrelevant for any purpose, doesn't establish or deny any of the issues in this case. We didn't ask if this contract was signed on that day. We have introduced no evidence on that subject. Now don't answer that question, Captain, because this is a different proposition.

By the COURT: Let me see the paper. (Examines paper.) I have not in my mind the direct examination of this witness. We have tried another case since then, and if the reporter will be kind enough to read the direct examination——

By Mr. BARNES: I can't hear your Honor.

By the COURT: I say I have not in my mind what the direct examination was sufficiently to enable me to rule what is pertinent cross-examination.

Argument.

By Mr. BARNES: We want to know if any other paper was signed by any of the parties on that day.

By Mr. HERRING: That is immaterial, we say. If they want to offer any such statement in support of their case they can but so far as this case now stands, Judge Barnes can't make a case in support of his title out of cross-examination.

99 By Mr. BARNES: Please mark that Exhibit "B" offered by the plaintiff.

By Mr. HERRING: We object to the introduction of that in evidence.

By Mr. BARNES: I am only asking to have it marked as an offer. If it don't go in we have a right to have it marked anyway.

Argument.

Direct examination of the witness Burns read by the reporter.

By the COURT: I don't see that the direct examination has disclosed any testimony that this is relevant to the contract on which you have sued.

Argument.

By the COURT: Exhibit No. 2 was the cancellation, that is, the revocation of the instrument sued on by the plaintiff, and accompanying it was introduced the letter that accompanied it.

Argument.

By Mr. BARNES: Now we offer to prove simultaneously and as part of that contract which is offered in evidence here, at the same time, that there was a consideration for it. Now if the paper offered in evidence had a consideration it would be irrevocable by one party without the consent of the other.

By the COURT: The Court has ruled on that. The Court asked for the direct examination to be read so as to be able to rule on this last offer. The question is whether the introduction by the
100 defendants of the revocation of that contract of March 26th would entitled the plaintiff on cross-examination to inquire into a collateral instrument executed at the same time that the contract was executed that this last paper revoked.

By Mr. BARNES: It was presented as a paper executed at that time.

Argument.

By Mr. BARNES: We propose to show that this contract contemplated drawing another contract and referred to another contract that they had in mind when this paper was signed. If he says "no" that ends it; if he says "yes" we will discuss the question of whether it is admissable or not.

Argument.

By Mr. HERRING: We object to it as immaterial and irrelevant and inadmissable in view of the fact that Exhibit 2 cancels it.

By the COURT: The objection will be sustained.

By Mr. BARNES: Note an exception.

Q. Now, if the Court please, I propose to offer in evidence and ask the reporter to take it down—the witness testified in chief that he was in possession of these mines in 1900 and 1901. Now was Mr. Taylor on those mines in 1900?

By Mr. HERRING: Object to it as immaterial and irrelevant and not referring to or decisive of any issues in this case.

By the COURT: If the counsel desires to get in any testimony as to whether Mr. Taylor was in possession he can do so, but
101 the question was whether he was on the property or not.

By Mr. BARNES: I will follow it up.

Argument.

By the COURT: Counsel may proceed.

Q. Was Mr. Taylor on that ground in 1900?

By Mr. HERRING: That is objected to as immaterial, irrelevant and incompetent.

By the COURT: The question may be answered. Objection overruled.

By Mr. HERRING: An exception will be permitted.

Q. Was Mr. Taylor on the ground in 1900?
A. What ground do you mean, sir?
Q. On the ground of those three claims?
A. Well, yes sir, he was on that ground.
Q. How much of the time?
A. Sir.
Q. How much of the year?
A. Well, I don't remember now exactly how much.
Q. How many men did he have employed there during that time?

By Mr. HERRING: Objected to as immaterial, irrelevant and incompetent because of the issues in this case.

By the COURT: The objection will be sustained unless it goes to the possession of the property.

By Mr. HERRING: I ask Your Honor to restrict that enquiry to subsequent to the date of the deed.

102 By Mrs. SORIN: If the Court please, the date of the instrument which the plaintiff pleads is March 26th, 1901. Any possession of Taylor prior to that time is of no effect here. The direct examination was confined to the fact that this witness was in possession and has been in possession since the date of this instrument to the present time, and on cross-examination any question as to what was done prior to that time, although in the year 1901, we object to as not cross-examination and irrelevant and inadmissable.

Argument.

By Mr. BARNES: It goes to the possession.

By the COURT: The objection will be overruled. The question may be answered.

By Mr. HERRING: Exception.

Last question read.

By Mr. HERRING: What time now is referred to?

By Mr. BARNES: 1900.

A. Well——

By Mr. HERRING: That goes to the men Mr. Taylor had employed.

A. Mr. Randolph had men employed on the ground.
Q. Who was in charge of those men?
A. Well, Mr. Taylor was in charge there.
Q. How many men were there?
A. Well, they varied.

Q. About how many?
103 A. Well, from two or four to five or six men at different times.
Q. Didn't they pay you a hundred dollars a month that year yourself for services on this ground?
A. No sir.

By Mr. HERRING: That is objected to—well, we will withdraw that objection.
A. No sir, not all that year he didn't.
Q. Did he any of the year?
A. A portion of it.
Q. What portion?
A. If I recollect right about three months.
Q. Was Mr. Taylor or Mr. Randolph doing that work there under any contract?

By Mr. HERRING: That is objected to as immaterial.
By the COURT: Objection overruled.
By Mr. HERRING: Exception.
By Mrs. SORIN: And irrelevant, let the objection state irrelevant.
A. The work was done under a bond to Mr. Randolph.
Q. Have you got a copy of that paper or have you got the paper that is, with you?
A. I have not.
Q. Where is it?
A. I don't know now. I have got a copy of it some place.
Q. You haven't got it here?
A. No.
104 Q. Did that paper give Mr. Randolph the right to work those mines?
A. In a certain way.
Q. For how long?

By Mr. HERRING: That is objected to as immaterial.
By the COURT: That bond was given to Randolph and work was done during that time?
By Mr. HERRING: We object to the question on the ground that these interrogatories should be confined to periods subsequent to the making of this deed.
By the COURT: What was the last question?
Last question read by the reporter.

Q. How long was that bond in force?
A. Eighteen months if I recollect right.
Q. Eighteen months. That would put it over to 1901?
A. Yes sir.
Q. Were you paid a salary by Mr. Randolph or Mr. Taylor during 1901 of one hundred dollars a month for any part of the year?
A. For about three months of that I was.
Q. By whom were you paid that three months' salary?
A. By Mr. Randolph.
Q. How much a month?

A. One hundred dollars a month.

Q. Who was Mr. Randolph's representative up there on the ground?

105 A. Mr. Taylor.

Q. Randolph wasn't there himself, was he, managing that business?

A. No.

Q. Did you know a young man named Buehring was interested with Mr. Randolph?

A. I don't know anything about that personally.

Q. Didn't you receive a paper signed by Mr. Buehring and Mr. Taylor giving you a release of all obligations up to date?

By Mr. HERRING: Object to that.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Did you say you didn't know anything about Buehring being interest- in that property?

By Mr. HERRING: Object to it as immaterial.

By the COURT: Objection sustained.

By Mr. BARNES: I except to it.

Q. Now in the year 1901 didn't you make some further locations in the neighborhood of these locations, these three locations mentioned in this case, in your own name?

By Mrs. SORIN: Object to that as immaterial.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. And did you not—was not the location work on those other mines done by Mr. Taylor and his men?

By Mrs. SORIN: We object to that as immaterial, irrele-

106 vant and incompetent, what location work was done on other claims than these.

By the COURT: Yes, the objection is sustained.

By Mr. BARNES: Note an exception.

Q. In 1900 were not those other locations besides these three mentioned in this case made by you and wasn't the location work done by Mr. Taylor and his men for you, in 1900?

By Mrs. SORIN: We object to that as immaterial, irrelevant and incompetent.

By the COURT: Objection sustained.

By Mr. BARNES: Except to it.

Q. Did not Mr. Taylor make locations adjoining and in the neighborhood of these claims in 1900 and 1901 in his own name and do the location work upon them——

By Mrs. SORIN: Object to it as immaterial, irrelevant and incompetent.

Q. And was it not a fact that at the time that the contract of

March 26th was made that Mr. Taylor released to you all claims for money he had advanced to you for these locations and released to you his locations adjoining these properties and took this contract of March 26th in settlement of that?

By Mr. SORIN: Object to that because the Court has excluded that and also that it is immaterial and irrelevant and incompetent.

By the COURT: The objection is sustained.

107 By Mr. BARNES: I except.

Q. And did not Mr. Taylor do for you over one thousand dollars' worth of work on said mines in 1900 and 1901, which was released as part of the consideration of the contract of March 26th, in this case?

By Mrs. SORIN: Object to it as immaterial, irrelevant and incompetent.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Did not Mr. Taylor do over three thousand dollars' worth of work, either himself or as the representative of Mr. Randolph, in 1900 and 1901, and wasn't the release of that work part of the consideration of this contract of March 26th, 1902?

By Mrs. SORIN: Object, immaterial, incompetent and irrelevant.

By the COURT: Objection sustained.

By Mr. BARNES: I except.

Q. Have you ever yourself done five hundred dollars' worth of work on those three mining claims sued on in this case?

By Mrs. SORIN: Object, immaterial and incompetent, and for the further reason that the plaintiff admits in the pleadings that the assessment work was done for the years 1900 and 1901.

Argument.

108 By the COURT: Objection sustained.

By Mr. BARNES: Exception. I propose to follow this up, Your Honor, and show that Mr. Burns has never done ten dollars worth of work on those claims. Randolph's money went into the making of those claims and this contract was made in order that Randolph might get a chance to reimburse himself. Now, if the Court please, if that isn't competent why, we will find out about it.

By Mr. HERRING: Object to it on the same grounds.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. What was the consideration of the contract of March 26th 1901, which you say you revoked?

By Mr. HERRING: That is objected to as immaterial.

Argument.

By the COURT: The Court is not passing upon the equities of that contract.

Argument.

By the COURT: The only extent to which the Court goes is to

ascertain the manner in which that instrument should be treated. It is presented here as a deed of conveyance.

Argument.

By the COURT: If the plaintiff had sued the parties on a contract or on an option it would have been one proposition, but he is claiming to be the owner of this property and has presented this
109 paper as a deed, and the Court has held that it is not a deed.

Argument.

By the COURT: I don't think the Court is trying to construe that contract. My recollection is that it came in here in explanation on your cross-examination.

Argument.

By the COURT: My recollection of the case is this: the plaintiff has brought his suit to quiet title, in which he has alleged that he is the owner of three mining claims, and that the defendants assert some interest or title to the property, and calls upon them to set forth what that claim and title is. When the case came on the plaintiff to support his side of the case introduced an instrument which he claimed to be a deed to the property and rested his case. The defendants introduced the mining locations and the evidence of witnesses and the discussion arose in regard to the deed that was introduced by the plaintiff, and the Court held that that was a memorandum of agreement between them in the nature of a contract and was not a conveyance of title but that the paper would be admitted in evidence for what it might show. I believe that is what the Court is now trying. If this was proceeded on as an option or a contract the Court would try different issues than it would in a case where this paper is presented as a deed of conveyance.
110 Now the witness was interrogated, either the present witness or the witness Duncan, in regard to whether Burns had notified Duncan of the existence of this instrument that was termed a deed or contract, and he replied that he had not. That was testified to by the witness Burns, I believe, and there were some further interrogatories as to why he had not done so and why Duncan was kept in the dark in regard to it. Then I think that the defendants introduced the instrument in evidence that they claim to be a revocation of this instrument. Now I don't know that it is incumbent upon the Court to determine whether or not the defendant Burns has any right or had any right to revoke this contract. It doesn't occur to me that that is in this case at present. That instrument was put in as an explanation of why Burns had sold this property to Duncan without advising him before the sale of the execution of this former instrument.

By Mr. HERRING: It was put in evidence as a revocation of the authority of Mr. Taylor, negativing his right to sell the property and to show that he had not the right to sell it.

By the COURT: If this were a trial on an option or right to sell the property under an option or a claim for commission these things would properly come into it. The fact that there had been an attempt at revocation was put in evidence as an explanation of the

silence on that subject of the witness Burns in his deal with Duncan.

111 By Mr. HERRING: It was put in evidence as a revocation of that authorization.

By the COURT: Yes, I don't see its materiality in this case. I don't know that it is material in this case. The fact is before the Court that that instrument was executed by the defendant Burns and it simply stands there to explain his transaction with Duncan.

(The Court examines the revocation.)

Argument.

By the COURT: That is, you are entitled to a judgment decreeing you the owners of the property and that the paper was a memorandum of agreement in which the party of the first part agrees to sell the properties upon the terms and conditions contained in the agreement, etc., (reading terms of the plaintiff's exhibit "A.") Now that is the contract.

Argument.

By the COURT: Now the revocation states that whereas, on the 26th day of March, A. D. 1901, the following authorization to Charles M. Taylor, then of Tucson, Arizona, to sell, negotiate or place the Magnet mining claim, the Comet mining claim and the Victor mining claim, all situate in the California Mining District in the Chiricahua Mountains, Cochise County, Arizona Territory,

112 was made by Thomas Burns of said county and territory, to-wit, etc., (reading terms of the revocation.) I have not been called to pass upon in this case what that might mean, what it might entitle him to as an option or broker's right for negotiating and placing the properties, but it was offered here as a deed showing him to be the owner of the property.

Argument.

By the COURT: As I say, I don't feel called upon to go into an examination on the trial of this case of what might be Taylor's rights under that contract. He has not put himself in shape to claim any rights under it as a deed to the property or a conveyance of the property to him. If he had secured or presented a purchaser of the property and had then asked Burns to execute a deed to the propetry it might have been different, but he has not presented any purchaser to the property and he has not asked Burns to execute any deed to the property, that is, I don't see that he has presented any purchaser for the property. I have simply ruled that that instrument is not or was not a conveyance of the property.

By Mr. BARNES: Under that view of the case I will now move Your Honor to strike out from this record that document which was offered in evidence and called a revocation as immaterial in this case. I move to strike it out.

By the COURT: The Court will deny the motion.

By Mr. BARNES: Take an exception. Now what was the last question?

113 Last question read by the reporter, as follows:

Q. What was the consideration of the contract of March 26th, 1901, which you say you revoked?

By Mr. BARNES: What is the ruling on that?

By Mrs. SORIN: That is objected to as immaterial, irrelevant and incompetent.

By the COURT: Now there are two phases of this case. I will say to counsel that if we go into the option or the authorization to sell and the right of the defendant to revoke that authorization, then this evidence would become material, but the Court at present does not feel inclined to go into that question. It does not occur to the Court that that is in this case. It does not occur to the Court that the decision of this case would adjudicate those matters between the parties, and in that view of the case I feel inclined to sustain the objection.

By Mr. BARNES: Note an exception.

Q. Take the witness. Oh! by the way, is that paper marked plaintiff's Exhibit "C" offered by the plaintiff in your handwriting and signed by you?

A. Yes sir.

Q. I offer it in evidence.

By Mr. HERRING: The Court will see by inspecting the date of this paper the nature of our objection that it is incompetent, immaterial and irrelevant. It is a paper that by its date pre-
114 cedes the agreement of these parties and at the conclusion of the Burns-Taylor agreement this language is recited "This contract is to take the place of and supercede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims." Now I just submit this to the Court. I say that this instrument is immaterial, irrelevant and incompetent in veiw of the evidence already submitted in this case and in view of the subsequent contract of March 26th.

By Mr. BARNES: I am not seeking to vary that contract but I am seeking to show the relations of the parties.

By the COURT: What is the date of that contract?

By Mr. HERRING: The 26th day of March.

Q. 1901?

A. Yes sir.

By the COURT: That being the case the objection will be sustained.

By Mr. BARNES: Exception. Now I want to offer in evidence a certified copy of a paper which is marked plaintiff's Exhibit "B" which is authenticated as being a true copy of the record. The same paper I asked Mr. Burns if he received. I want to offer it again.

By Mr. HERRING: The objection is made to it that it is irrelevant, immaterial and incompetent.

By Mr. BARNES: You don't object to it on the ground that we don't prove the signature. That's what I want to get at.

115 By Mr. HERRING: We don't object to the signature.

By Mr. BARNES: We want to offer it as a contemporaneous document tending to show the consideration of the contract of March 26th. I offer it in evidence.

By Mr. HERRING: The objection by counsel for the defendants is

renewed, that it is immaterial, irrelevant and incompetent to establish or disprove and of the issues in this case.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Mr. Burns, did you execute this document; is that your signature? (Handing paper to the witness.)

A. Yes sir.

Q. I offer that in evidence. Is the date of that instrument correct?

A. I don't know; I didn't notice the date at all.

By Mr. HERRING: The 11th day of May, 1900.

A. Yes.

Thereupon the same was marked as Plaintiff's Exhibit "D" offered in evidence.

By Mr. HERRING: To the introduction of this paper offered by counsel for the plaintiff we object on the ground that it is immaterial, incompetent and irrelevant. It appears by its date that it is one of the contracts superceded by the contract of March 26th, 1901. The Court can see this date, the 11th day of May, 1900.

116 By the COURT: Objection sustained.

By Mr. BARNES: Exception, and an exception noted on that other document too, Mr. Reporter.

Q. Now, Mr. Burns, did you write a letter, which I offer to you and which may be marked exhibit "E"—was that letter written by you of its date? (Hands letter to witness.)

A. Yes, sir, I wrote that letter.

By Mr. BARNES: I offer it in evidence.

By Mr. HERRING: Well, counsel for the defendants objects to the introduction of that paper for the reason that it is irrelevant, immaterial and incompetent in that it does not upon its face indicate that it relates to anything connected with the subject matter of this action, and we submit it to the Court on that objection, and it is not cross-examination of any part of the evidence, we object to it on that ground.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Mr. Burns, you were talking about a letter written to you by Charles M. Taylor, dated the 23rd of February, 1903, which has been offered in evidence. You have been asked about this paper, have you not, Mr. Burns? (Hands paper to the witness.) Do you remember whether you received that about the date it was written, February 23rd, 1903?

A. I don't know now, sir.

Q. What do you say?

117 A. I don't know the exact date now; I don't remember.

Q. Wasn't this document called a revocation—what date is that, do you remember?

A. I don't remember now.

Q. Signed by you on the 27th day of February, 1903?
A. Well, that's right, sir.
Q. Didn't this letter get to you two or three days before you signed that paper called a revocation?
A. What letter do you refer to?
Q. This letter; look at it. (Hands letter to the witness.)
A. I don't know what it is. (Examines paper.) Yes sir.
Q. You wrote that—that revocation was written by you a day or two after you received this letter?
A. Yes sir.
Q. Did you answer this letter at all? Except that that revocation answered it?
A. I don't remember now.
Q. Did you answer it except with the revocation and the letter accompanying it in evidence here in this case?
A. I don't remember, I won't be positive about that, whether I did or not.
Q. You did sign the letter offered in evidence here that accompanied what is called a revocation?
A. Yes sir.
Q. And that was sent two or three days after you received
118 this? (Indicating another letter.)
A. Yes sir.
Q. That is all.

Recess taken until 2 P. M.

2 P. M., JUNE 30TH, 1903.

JOHN A. DUNCAN, one of the defendants, called as a witness in behalf of the defense and first duly sworn, testified as follows:

Direct examination by Mr. HERRING:

Q. What is your name?
A. Jno. A. Duncan.
Q. Your residence?
A. St. Joseph, Missouri.
Q. You are one of the parties to this action, a defendant?
A. Yes sir.
Q. The answer in this case sets up the allegation that you are the owner of a one-fourth interest; did you ever receive a deed for such interest?
A. I have, yes sir.
Q. Produce it. (Witness produces a document.) We will have this marked defendants' Exhibit "5." We offer this deed in evidence.

By Mr. BARNES: We admit that a deed was made but we claim
that it was subject to our interest. (Mr. Herring hands the
119 document to Mr. Barnes.) No, no objection to that.

Q. This instrument is dated, Captain, the 9th day of November, 1901. It is in evidence now. Prior to that time did you have any notice or knowledge of this instrument or paper or agree-

ment that is referred to in this case, between the defendant Burns and Charles M. Taylor?

A. No sir.

Q. At that time did you have any notice or knowledge of such an agreement—at the time of the conveyance to you?

A. No sir.

Q. You are still the holder of this interest, are you?

A. Yes sir.

Q. Since the date of the conveyance of this one-fourth interest to you have you or have you not been in possession of these properties, the Magnet, Comet and Victor mining claims?

A. I have, yes sir.

Q. And still hold that possession?

A. Yes sir.

Q. That is all of you.

Cross-examination by Mr. BARNES:

Q. You say that at the time this deed was made to you you had no knowledge of any contract between Taylor and Burns?

A. Yes sir.

Q. That deed was given to you for the consideration expressed in the deed?

A. Yes sir.

120 Q. That is all.

By Mr. HERRING: Defendants now offer in evidence the following memorandum of agreement between Thomas Burns and Jno. A. Duncan and S. R. Kaufman, Trustee, one of the parties in this action. The purpose of this is to show their interests; to show the interest of Kaufman in this property. This is a certified copy. It may be marked Defendants' Exhibit "6." We now offer it in evidence.

By the COURT: Let it be marked.

By Mr. HERRING: The certificate of the County Recorder is offered.

By Mr. BARNES: The whole of it is admitted.

By Mr. HERRING: The whole instrument is offered in evidence and admitted in evidence, I presume.

By Mrs. SORIN: We now offer in evidence and would like the Reporter to take down as part of the evidence in this case the admission of the plaintiff contained in the answer to the cross-complaint. Has Your Honor a copy of the pleading there?

"1.

That he admits subdivision 2 of the Amended Cross Complaint filed June 19th, 1903.

That admission refers to subdivision two of our amended cross complaint, which is:

"2.

Defendants allege that on the 27th day of February, 1900, the defendant Thomas Burns, being a citizen of the United

121 States, went upon the public domain of the United States, and having there made discoveries of mineral in place, pro-

ceeded to locate the three mining claims above referred to, which he named respectively Magnet, Comet and Victor, and upon said day posted at the Point of Discovery upon each of said claims a Notice of Location of the claims; that subsequently, and within ninety days from said date of said locations, and in the manner prescribed by law, said defendant Burns caused the discovery or location or preliminary work to be done and completed upon each of said mining claims, and duly marked the boundaries thereof; that after fully complying, as to each of said claims, with the laws of the United States and the laws of the Territory of Arizona in relation to the location of Mining Claims, said defendant caused to be made out and recorded, in the office of the Recorder of Cochise County, on the 5th day of March, 1900, a Notice of Location of each or said three mining claims, which notices of location described the location and boundaries of said claims respectively, and which are the Notices of Location hereinbefore referred to."

That is the language of that allegation, and the defendants also offer in evidence the admission of the plaintiff of the allegation in subdivision three of the cross complaint, which is "He also admits subdivision three of same," which allegation is—this is the exact language:

"3.

122 That during each of the years 1901 and 1902, said defendant Burns performed not less than $100.00 worth of labor or improvements upon each of said three Mining claims."

That is the language of that subdivision. That is all we want to offer.

By the COURT: Very well.

By Mr. HERRING: In regard to the deed from Duncan, or rather from Burns to Duncan, it is read in evidence; it is not necessary to read it now but I will have it read in evidence; also this memorandum known as the Kaufman memorandum. That is read in evidence.

By. Mr. BARNES: If the Court please, we object to the introduction of any excerpts from the pleadings on the ground that they prove themselves.

Argument.

By the COURT: The objection is overruled.

By Mr. BARNES: Exception.

Thereupon the deed and the memorandum last referred to by Mr. Herring were considered read in evidence as follows:

THE TERRITORY OF ARIZONA, *County of Cochise:*

Know all men by these presents: that I, Thomas Burns,
123 of said County and Territory, for and in consideration of the sum of One ($1.00) Dollar, and for other valuable considerations, to me in hand paid by John A. Duncan, of St. Joseph, Missouri, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said John A. Duncan, of the County of Buchanan, State of Missouri, the following described property:

One undivided one-fourth (¼) interest, in and to the following

mining claims, located in the California Mining district, in the County of Cochise, and Territory of Arizina, to-wit: The Mars, Ajax, Comet, Magnet, Victor, Vixen, Venture, Atlas, Henley, Maddox, Ray and Center.

To have and to hold the above described one-fourth of the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said John A. Duncan, his heirs and assigns, and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said John A. Duncan, his heirs and assigns against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness my hand, this 9 day of November, 1901.

THOMAS BURNS.

124 THE TERRITORY OF ARIZONA, *County of Cochise:*

Before me, E. F. Kelsey, a Notary Public, in and for Cochise County, Territory of Arizona, on this day personally appeared Thomas Burns, to me known to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 9th day of November, 1901.

E. F. KELSEY,
Notary Public.

[NOTARIAL SEAL.]

My commission expires Nov. 22, 1904.

(Endorsed on back:) Thomas Burns to John A. Duncan. Deed. Recorder's Office. Tombstone, Cochise Co., A. T. Filed and recorded at request of Jno. A. Duncan, Nov. 25, A. D. 1901, at 1 P. M. Book 14, Deeds Mines, Pages 302–303. Pd. Frank Hare, County Recorder. Filed June 30, 1903, Geo. B. Wilcox, Clerk. No. 3161. Defendants' Exhibit "5" for identification. C. I. McReynolds, Official Reporter.

125 Memorandum of Agreement this day made between Thomas Burns, of San Simon, Cochise County, Territory of Arizona, and John A. Duncan, of St. Joseph, Buchanan County, State of Missouri, party of the first part, and S. R. Kaufman, Trustee, party of the second part, Witnesseth:

That for and in consideration of the sum of One Dollar ($1.) in hand paid by the party of the second part to the said party of the first part, the receipt whereof is hereby acknowledged, and of other valuable considerations, the said party of the first part hath covenanted and agreed, and by these presents doth covenant and agree, to sell, grant and convey by a good and sufficient deed to the said S. R. Kaufman, Trustee, the following named mining claims, situate in the California Mining District, County of Cochise, Territory of

Arizona, the location certificates of which are recorded in the office of the County Recorder of said Cochise County, as follows, to-wit: Venture, recorded in Book 15, Record of Mines, at page 273. Oak, recorded in Book 15, Record of Mines, at page- 385–386. X *Victor,* recorded in Book 15, Records of Mines, at page 78; Ray, recorded in Book 15, Records of Mines, at page 270; X *Magnet,* recorded in Book 15, Records of Mines at page 76; X *Comet,* recorded in Book 15, Records of Mines, at page 269; Maddox, recorded in Book 15, Records of Mines, at page 271; Ajax, recorded in
126 Book 15, Records of Mines, at pages 82 and 83; Mars, recorded in Book 15, Records of Mines, at pages 80 and 81; Old Pick, recorded in Book 15, Records of Mines, at page 217; Neptune, recorded Book 23, Records of Mines, at page 340; Sunshine, recorded Book 23, Records of mines, at page 342; Navarre, recorded in Book 23, records of mines, at page 339; Diamond, recorded in Book 21, record of Mines, at page 303; Midland, recorded Book 23, Record of Mines, at page 337; Scotland, recorded Book 23, Record of Mines, at page 343; Bowen, recorded Book 23, Records of Mines, at page 334; Fairhaven, recorded Book 23, Records of Mines, at page 336; Planet, recorded Book 23, Record of Mines, at page 341; Mercury, recorded in Book 23, Records of Mines, at page 338; and Friday, recorded in Book 23, Records of Mines, at page 335; at any time within two years after the 6th day of March, A. D. 1903, upon the terms, covenants and conditions set forth in an escrow agreement, deposited on the 9th day of March, A. D. 1903, with the Consolidated National Bank of Tucson, Arizona. This agreement terminates absolutely in two years from said 6th day of March, A. D. 1903, if the rights of purchase set forth in said escrow are not by that time exercised.

In Witness Whereof the parties hereto have hereunto set their hands this 9th day of March, A. D. 1903.

THOMAS BURNS.
JOHN A. DUNCAN.
127 S. R. KAUFMAN, *Trustee.*

TERRITORY OF ARIZONA, *County of Pima, ss:*

Before me, Nellie R. Conger, a Notary Public in and for the County of Pima, Territory of Arizona, on this day appeared Thomas Burns, John A. Duncan and S. R. Kaufman, Trustee, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 9th day of March, A. D. 1903.

My commission expires Sept. 30, 1905.

NELLIE R. CONGER,
[SEAL.] *Notary Public.*

Filed and recorded at request of Hereford & Hazzard M'ch 11th 1903, at 9 A. M. Book 7 Miss. Records, Cochise County, Arizona Territory.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, Frank Hare, County Recorder in and for said County, hereby certify that I have compared the foregoing copy with the original agreement between Thos. Burns, John A. Duncan and S. R. Kaufman, Trustee, filed and recorded in my office on the 11th day of March, 1903, in Book 7, Miscellaneous Records, at pages 251-
128 2-3, and that the same is a full, true and correct copy of such original and of the whole thereof.

Witness my hand and seal of office, this 17th day of March, 1903.

FRANK HARE,
[SEAL.] *County Recorder.*

(Endorsed on the back:) Filed June 30, 1903, Geo. B. Wilcox, Clerk. No. 3161. Defendants' Exhibit for identification "6." C. I. McReynolds, Official Reporter.

By Mr. HERRING: Defendants rest.

By Mr. BARNES: I will call Mr. Taylor.

CHARLES M. TAYLOR, the plaintiff, called as a witness in his own behalf and first duly sworn, testified as follows:

Direct examination by Mr. BARNES:

Q. In the years 1900 and 1901 was the defendant Burns working on these properties in your employ?

By Mr. HERRING: Object to it as immaterial and for another reason——

By Mrs. SORIN: He has rested his case and can't now be heard. He can't re-open his case and go into his case by testimony of this character, and the question is certainly irrelevant and immaterial for the reason that the date at which this title is assailed is
129 the date of the instrument which they have offered as a deed, and it therefore becomes entirely immaterial under the admissions in the case and the date in question whether such evidence as this should be elicited from this witness or not.

Argument.

By the COURT: Objection sustained.

By Mr. BARNES: Now does the Court sustain the objection on the ground that it wasn't offered in chief. If on that ground I want to say that Mr. Taylor wasn't here on Saturday and to ask the indulgence of the Court to allow us to take this testimony.

By the COURT: The objection was also sustained on the ground that it would be immaterial how much work was done on that property by you or under your direction prior to the execution of the contract of March 26th in evidence in this case.

By Mrs. SORIN: We object to that as immaterial, irrelevant and incompetent.

By Mr. BARNES: I avow that I expect to prove that there was nearly three hundred feet of tunnel run on that property by Mr. Taylor and that I expect to prove that there was a shaft of over

fifty feet sunk on that property and a drift upon that of over twenty feet.

By Mrs. SORIN: We object to that offer. It only contains just what the answer of the witness to this question would contain.

130 By Mr. BARNES: That is exactly the answer I expect him to give.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. How much money did you and your associates expend on that property between the time of the location of those claims on the 5th of some month, I forget which—how much money did you expend in work and labor, how much work and labor did you pay for, you and your associates, between the time of the location of those claims in February, 1900, and the execution of the contract which has been admitted in evidence in March, 1901?

By Mrs. SORIN: Object to that as irrelevant, immaterial, incompetent and not tending to sustain any issue made by this plaintiff.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Were there other locations owned or claimed by Mr. Burns adjoining or in the neighborhood of these claims sued for in this case; if so how many were there?

By Mrs. SORIN: Objected to as being entirely irrelevant.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Did you furnish the labor, pay for the labor in the location work on four or more claims in the neighborhood of these claims sued for in this case, for Mr. Burns?

131 By Mrs. SORIN: Object to that as immaterial, irrelevant and incompetent.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Did you at the time of the execution of the contract which has been offered in evidence here dated March 26th, 1901, as part of the consideration of that contract release Mr. Burns from all obligations for prior indebtedness for work done upon these claims?

By Mrs. SORIN: Object to that as immaterial, irrelevant and incompetent.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. State whether or not you at the time and as part of the consideration of the contract of March 26th, 1901, abandoned and released to Mr. Burns the mining claims in the neighborhood of these claims?

By Mrs. SORIN: Objected to as irrelevant, immaterial and incompetent.

By the COURT: Objection sustained.
By Mr. BARNES: We except.

Q. State whether or not that other claim was a valuable claim and worth several thousand dollars?

By Mrs. SORIN: Object to that as immaterial, irrelevant and incompetent and calling for the conclusions of the witness.
132 By the COURT: Objection sustained.
By Mr. BARNES: Exception.

Q. You may state in full what was the consideration which moved from you to Mr. Burns for the contract of March 26th, 1901.

By Mrs. SORIN: Object to that as immaterial, irrelevant and incompetent. The consideration is stated in the instrument.
By the COURT: Objection sustained.
By Mr. BARNES: Exception.

Q. At the time of the execution of the contract of March 26th, 1901,contemporaneous with it and as part of it was a document executed by you and one Buehring and delivered to Mr. Burns?

By Mrs. SORIN: Object to it as leading and also immaterial, irrelevant and incompetent.
By the COURT: Objection sustained.
By Mr. BARNES: Exception. If the objection was sustained on the ground of being leading I will modify my question.
By the COURT: The objection was sustained on the other ground likewise.

Q. I show you a certified copy of a document, the document marked plaintiff's Exhibit "B" as offered. State whether or not that paper was executed by you and Walter D. Buehring contemporaneously with the contract of March 26th, 1901, and delivered to Mr. Burns.

By Mrs. SORIN: That is objected to. It is one way of
133 getting before the Court what has already been excluded, and further it is irrelevant, incompetent and immaterial.
Argument.
By the COURT: Objection sustained.
By Mr. BARNES: Exception.

Q. Was the Buehring named in that document interested with you and associated with you in furnishing part of the money, if any was furnished, for work done upon the claims other that those sued for in this case for which Mr. Burns owed you money?

By Mrs. SORIN: Object to that as entirely irrelevant and incompetent.
By the COURT: Objection sustained.
By Mr. BARNES: Exception.

Q. Who were your associates in doing any work upon these claims between February, 1900, and March 26th, 1901?

By Mrs. SORIN: Objected to as immaterial, irrelevant and incompetent.

By the COURT: Objection sustained.

By Mr. BARNES: We except.

Q. Now I want to avow there upon the record that I expect the answer to that question to be the Mr. Walter Buehring named in the paper I asked him about just now, and that Mr. Randolph was interested with him and furnished the money for that work. Note an exception to the ruling.

134 By Mrs. SORIN: We object to that as immaterial, irrelevant and incompetent and an indirect way of trying to get before the Court evidence which has been excluded.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Who was in possession of these three claims sued for in this case during the time that you did work upon those claims?

By Mrs. SORIN: Object to that as immaterial, incompetent and irrelevant and not sustaining any of the issues in this case.

By the COURT: The time is indefinite. The question does not state whether it is between the time of the location of these claims and the execution of the contract of March 26th, 1901.

By Mr. BARNES: I mean between those dates.

By Mr. HERRING: It is entirely irrelevant.

By the COURT: Objection overruled.

By Mr. HERRING: Exception.

Last question read by the reporter.

By Mrs. SORIN: We object upon the further ground that there is no testimony before the Court when he did the work and the question calls for testimony already excluded by the Court.

By the COURT: The reporter has the question exactly as the words of the counsel gave it, but the question does not mean the indefinite time first given by the counsel because part of that was given in answer to my question.

135 The question should read with the substitution of the latter date for the former. In other words, counsel in his repetition of the question makes it refer to the time from the location of the claims up to the execution of the contract in question.

Last question now read as follows:

Q. Who was in the possession of these three claims sued for in this case between the time of the location of those claims and the execution of the contract of March 26th, 1901?

By Mrs. SORIN: Object to it as immaterial, irrelevant and incompetent.

By the COURT: Objection overruled.

By Mrs. SORIN: Exception.

A. I was.

Q. For how long a time?

A. From the signing of the——

By Mr. HERRING: We also object to that on the grounds stated just now as objections to the previous question, as incompetent, immaterial and irrelevant, how long a time he was in possession of these claims prior to the execution of the contract referred to.

By the COURT: Objection overruled.

By Mr. HERRING: Exception.

Q. How long a time were you in possession of them?

A. Well, from the time we signed——

136 Q. I don't know anything about signing anything. I say how long.

By Mr. HERRING: That is objected to. It must be fixed at some time.

By the COURT: Objection overruled.

By Mr. HERRING: Exception.

Q. Well, how long was it. The question is how long it was. How many months, days or years.

A. Then I will have to give you dates.

Q. Well, give us dates.

A. From the time——

Q. What date was it?

A. I don't remember the exact date.

Q. About how many months was it?

A. From along in March, 1900, to March, 1902.

Q. Now during that time was Mr. Burns in your employ on this ground?

By Mrs. SORIN: Objected to as immaterial, incompetent and irrelevant.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. During that time—I will ask you whether or not you paid him a salary of one hundred dollars a month for a portion of the time acting as your foreman or employed on that ground?

By Mrs. SORIN: Object to that as immaterial, irrelevant
137 and incompetent and not tending to prove any of the issues in this case.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. During the time that you was in possession of these claims as you have stated was Mr. Burns on the ground?

By Mrs. SORIN: Objected to as immaterial.

By the COURT: Objection sustained.

Q. And if so, in what capacity?

By Mr. HERRING: Same objection.

By the COURT: Same ruling.

By Mr. BARNES: Note an exception to both rulings.

Q. State whether or not he was there in the capacity of exclusive owner or there in the capacity of owner or as an employee of yours?

By Mrs. SORIN: That is objected to as immaterial, incompetent and irrelevant.

By Mr. HERRING: And calling for a conclusion of law.

By the COURT: Objection sustained.

By Mr. BARNES: We want exceptions noted to all of these rulings.

By the COURT: Very well.

Q. There has been a letter offered in evidence purporting to be signed by you, Mr. Taylor. I will show it to you. (Hands witness a letter). Did you write that letter?

A. Yes, sir.

138 Q. Were other claims besides these claims sued for in this case discussed and talked about in that letter?

By Mrs. SORIN: Object to it as immaterial.

By Mr. HERRING: The letter is the best evidence of what they discussed too.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Were you at that time endeavoring to sell this property?

By Mr. HERRING: That is objected to as immaterial and irrelevant in evidence unless he did sell it.

By Mrs. SORIN: And incompetent to sustain any of the issues in this case. He admits in the pleadings that he didn't sell it.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception.

Q. Now when you state in that letter that unless he fixes a price on those other claims you will sell these properties, the Comet, Victor and Magnet—now when you said in that letter that unless he would fix a price on the other claims you would sell the Victor, Comet and Magnet, did that refer to this contract of March 26th?

By Mr. HERRING: Object to that as immaterial, incompetent, and irrelevant. They can't explain the contents of that letter.

139 By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Did Mr. Burns put any obstacle in the way of your selling these claims? If so, state what he did.

By Mr. HERRING: Object to it as incompetent and irrelevant.

By the COURT: Objection sustained.

By Mr. BARNES: Exception.

Q. Did Mr. Burns render you any assistance when called upon, in selling these mines? If so, state what assistance he rendered.

By Mr. HERRING: Object to it as incompetent, immaterial and irrelevant. There is no evidence here that he ever called upon him for any assistance.

By the COURT: Objection sustained.

By Mr. BARNES: Note an exception. That is all.

Cross-examination by Mr. HERRING:

Q. Mr. Taylor, where were you in March, 1902? That is a year ago this last March. Where were you?

A. I don't know whether I was in Phoenix, or in Tucson. I was going back and forth quite often.

Q. Well, is the Burns camp in Phoenix?

A. Not that I know of.

Q. Do you know of his having a camp in Tucson?

A. No sir.

Q. Then when you say you were in possession in 1902 of
140 these claims, in March, 1902, do you wish that to stand on this record?

A. We took possession——

Q. Answer the question as it is; afterwards you can explain.

By Mr. BARNES: You can explain in your own way.

A. It was 1901.

Q. Do you wish that to stand?

A. No sir, it was 1901 instead of 1902. I got the dates mixed.

Q. That is all, sir. That is all we want to ask you. You say you were in possession from March, 1900, to March, 1901?

A. Yes, sir.

Q. That is all. Now I object to the answer of the witness as immaterial, incompetent and irrelevant and move to have it striken out.

Argument.

By the COURT: The witness will be permitted to correct his testimony.

By Mr. HERRING: Exception. That is all, Mr. Taylor.

By Mr. BARNES: That is all. That is our case. I will submit it.

By Mr. HERRING: We submit it.

By Mr. BARNES: Your Honor, I will offer some findings which I will ask the Court to make.

By the COURT: Very well. Counsel may prepare findings and judgment for the defendants in this case.

141 By Mr. HERRING: What is that?

By the COURT: I say counsel may prepare findings and judgment for the defendants in this case.

By Mr. HERRING: For the defendants?

By the COURT: Yes sir.

By Mr. HERRING: All right, sir.

TERRITORY OF ARIZONA, *County of Cochise, ss:*

I, C. I. McReynolds, Official Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify that the above and foregoing sixty-three (63) pages of typewritten matter constitute and contain a full, true and correct copy of all questions propounded to witnesses and their answers thereto on the trial of the case of Charles M. Taylor, plaintiff, against Thomas Burns, Jno. A. Duncan, and S. R. Kaufman, Trustee No. 3161, as well also as all remarks rulings, opin-

ions and judgments given and rendered during the trial thereof by the Judge presiding at the trial, and that they contain all the oral evidence in the case.

Witness my hand this 7th day of August, A. D. 1903, at Tombstone, in said County and Territory.

C. I. McREYNOLDS,
Official Court Reporter, Second Judicial District, Territory of Arizona, in and for the County of Cochise.

142 The foregoing transcript, containing all of the oral evidence given upon the trial, together with the objections and exceptions of counsel for the parties, is filed as a bill of exceptions.

BARNES & MARTIN,
D. L. CUNNINGHAM,
Attorneys for Plaintiff.

The foregoing bill of exceptions having been submitted to us for inspection, we have examined the same and find it to be correct.

HERRING & SORIN,
Attorneys for Defendants.

Counsel for the plaintiff having presented to me the foregoing bill of exceptions as of date September 15th, 1903, the same having been lodged with the Clerk of this Court on that date, and within the time allowed by an order heretofore entered by the Court in this case, being before the close of the term, and the same having been submitted to the counsel for the defendants and having been found correct by them, and it appearing to me that said bill of exceptions contains all of the oral evidence given upon the trial, together with the objections and exceptions of counsel for the parties, and said bill of ex-
143 ceptions being found by me to be correct, is now by me signed and filed with the Clerk, and made a part of the record herein, as of date September 15th, 1903.

FLETCHER M. DOAN, *Judge.*

(Endorsed:) In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise. Charles M. Taylor, Plaintiff, *vs.* Thomas Burns, Jno. A. Duncan, and S. R. Kaufman, Defendants. No. 3161. Reporter's Transcript of Evidence. Trial in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, before His Honor, Fletcher M. Doan, Judge, sitting without a jury, on the 27th and 30th days of June, A. D. 1903, at the Court House in the city of Tombstone, in said County and Territory. Appearances. Barnes & Martin and D. L. Cunningham for Plaintiff. Herring & Sorin for defendants. Filed Sep. 15, 1903. Geo. B. Wilcox, Clerk Dist. Court. No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thos. Burns, *et al.* Reporter's Transcript of Testimony. Filed October 23, 1903, S. M. Cullom, Clerk.

144 Transcript of the record demanded September 28th, 1903, by Barnes & Martin, Counsel for Plaintiff.
Transcript of the record furnished September 29th, 1903.
GEO. B. WILCOX, *Clerk.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHAS. M. TAYLOR
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFMAN.

June Term, 1903.

SATURDAY, *June 6th,* 1903.

Comes now the Defendants herein by their Attorneys, Herring & Sorin, and ask leave of the Court to withdraw their motion to dismiss the case, and to withdraw their demurrer to Plaintiff's complaint, which was granted. Upon motion of D. L. Cunningham, Esq., representing Barnes & Martin, Attorneys for Plaintiff, It is by the Court ordered that this cause be and the same is hereby continued to a later day of this Term of Court, and further that Plaintiff pay costs up to date.

MONDAY, *June 8th,* 1903.

By consent of parties, It is by the Court ordered that
145 this cause be, and the same is hereby set for trial June 24th, 1903.

SATURDAY, *June 27th,* 1903.

Upon motion of Barnes & Martin, Esqrs., It is by the Court ordered that D. L. Cunningham, Esq., be entered as Associate Counsel for Plaintiff.

SATURDAY, *June 27th,* 1903.

This cause came on today regularly for trial, Barnes & Martin and D. L. Cunningham, Esq., appearing as counsel for the Plaintiff, and Herring & Sorin appearing as counsel for the Defendants, in the presence of and before the Court, sitting without a jury, a jury having been expressly waived in open court by both parties hereto, the trial proceeded upon the pleadings herein; and the Plaintiff to maintain upon his part the issues herein introduced certain documentary evidence and calls as a witness Thos. Burns, who was duly sworn, examined and cross-examined, and rests his case. The Defendants then to maintain upon their part the issues herein introduce certain documentary evidence and recall Thos. Burns, who was further examined and cross-examined. And this being the usual hour of recess, it is by the Court ordered that this case be and the same is hereby continued till Monday, June 29th, 1903, at 8:30 o'clock A. M.

146 TUESDAY, *June 30th,* 1903.

This cause having been continued to this day, comes now all parties hereto into open Court, Whereupon the trial proceeds as

follows: The Defendants to further maintain upon their part the issues herein, recall Thos. Burns, as a witness, who was further examined and cross-examined. And this being the usual hour of recess, it is by the Court ordered that this case be and the same is hereby ordered continued till 2.00 o'clock P. M. this day.

TUESDAY, *June 30th*, 1903—2.00 p. m.

Upon the reassembling of Court comes now all parties hereto, and the case proceeds as follows: The Defendants to further maintain upon their part the issues herein, introduce certain documentary evidence and call as a witness John A. Duncan, who was duly sworn, examined and cross-examined, Whereupon defendants rest their case. Plaintiff thereupon calls, in rebuttal, Chas. M. Taylor, who was duly sworn, examined and cross-examined, whereupon Plaintiff rests. There being no further testimony offered, the evidence was declared closed, and thereupon submitted to the Court without argument. And the cause being now fully submitted to the Court and the Court being fully advised in the premises does find the issues herein in favor of Defendants and against the Plaintiff and does hereby order judgment herein in accordance with the prayer of Defendants' Cross-complaint.

147 WEDNESDAY, *July 1st*, 1903.

Now comes Barnes & Martin, Esqrs., Counsel for Plaintiff and moves the Court for a new trial, which was by the Court overruled. Exception by Pltff. Plaintiff thereupon gives notice of Appeal to the Supreme Court of the Territory of Arizona.

MONDAY, *July 13th*, 1903.

Upon motion of D. L. Cunningham, Esq., attorney for Plaintiff, it is by the Court ordered the said plaintiff be allowed until the close of the present term of Court to file Bill of Exceptions.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

CHAS. M. TAYLOR, Plaintiff,
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFMAN, Defendants.

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify that the above and foregoing four (4) pages constitute and contain a full, true and correct copy of all of the minute entries in the above entitled case, and that they, together with the attached original papers, consisting
148 of the judgment roll, Plaintiff's Exhibits "A," "B" Ruled Out, "B," "C," "D," and "E," and Defendants' Exhibits "1," "2," Part of "2," "3," "4," "5," "5" for identification. "6" for identification, Application to withdraw file papers, Memorandum of

Costs and Disbursements, Bond on Appeal, and Bill of Exceptions, constitute a record of all of the proceedings in the case.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, at Tombstone, this 29th day of September, A. D., 1903.

[SEAL] GEO. B. WILCOX,
Clerk of said Court.

(Endorsed) In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, Appellant, *vs.* Thos. Burns, Jno. A. Duncan, and S. R. Kaufman, Respondents. No. 840. Minute Entries and Certificate of the Clerk of the Lower Court. Filed October 23, 1903. S. M. Cullom, Clerk.

149 No. 840.

In the Supreme Court of the Territory of Arizona.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS, JOHN A. DUNCAN, and S. R. KAUFMAN, Trustee, Appellees.

Appeal from the District Court of Cochise County—Hon. Fletcher M. Doan, Judge.

Barnes & Martin and D. L. Cunningham for Appellant.
Herring & Sorin for Appellees.

Opinion by Sloan, J.

The appellant brought suit in the court below against the appellees to quiet title to three mining claims known as the Victor, Magnet and Comet, situate in the California Mining District in Cochise County.

These claims were located on the 27th day of February, 1900, by the appellee, Thomas Burns. On November 9th, 1901, Burns conveyed a one-fourth interest in the claims to the appellee, John A. Duncan, and on the 9th day of March, 1903, Burns and Duncan entered into an agreement for the sale of the claims with the appellee, S. R. Kaufman, as trustee. The appellant, Taylor, bases his title to the claims upon an agreement entered into with Burns on the 26th day of March, 1901. This agreement is as follows:

150 "This Memorandum of Agreement, made and entered into this 26th day of March, A. D., 1901, by and between Thomas Burns (a widower) of Cochise County, Arizona, the party of the first part and Charles M. Taylor of Tucson, Arizona, the party of the second part, Witnesseth:

That the said party of the first part in consideration of the sum of one dollar lawful money of the United States of America in hand

paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claims, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and conditions following to-wit:

The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, Forty-Five Thousand Dollars ($45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000.00; that is to say the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000.00, and may retain out of said purchase price seven-
151 eighths (⅞) of said selling price above such sum of $45,000.

The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same.

This contract is to take the place of and supercede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

In Witness Whereof, the said parties have hereunto set their hands this twenty-sixth day of March, A. D., 1901.

Executed in Duplicate.

(S'd) THOS. BURNS.
(S'd) C. M. TAYLOR."

Upon the trial of the action the court admitted this agreement in evidence but found that it vested in plaintiff no estate, right or title in or to the said mining claims and gave judgment against the appellant and in favor of the appellees quieting their title in and to the same.

The only question involved is the construction to be given the agreement between Taylor and Burns. The contention of the Appellant is that the agreement amounted to a sale to him of the mines for a given and valid consideration expressed in the instrument.

The contention of counsel for the appellees is that, from the
152 instrument as a whole, it clearly amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement, revocable at will. Upon the latter contention it was admitted by the appellant that if the instrument was revocable at the will of Burns, such revocation was made by Burns, on February 27th, 1903.

It is a settled rule of construction of instruments of this character

that the intention of the parties must govern, as this intention is evidenced by a consideration of the entire instrument.

Williams *vs.* Paine, 169 U. S. 76.

"The elementary canon of interpretation is not that particular words may be isolatedly considered but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

O'Brien *vs.* Miller, 168 U. S. 297.

Tested by this rule the agreement cannot be construed as a conveyance. For a consideration Burns agreed to sell upon certain terms and conditions expressed. These terms and conditions were that Taylor was empowered and authorized to sell and negotiate the mines for any price above $45,000.00; that upon such sale being made he should pay to Burns $45,000.00 of the purchase price and one eighth of the excess of the purchase price over and above $45,000.00; and that both parties should aid and assist each other in the negotiation and sale of the claims in order that they
153 might quickly be sold and the consideration realized; and that further, upon said sale Burns should execute any deed or deeds of conveyance that might be necessary to convey a good title to the purchaser or purchasers.

It will be noted that Taylor was not obligated to pay any sum or sums of money whatever. There is nothing in the instrument which would permit a recovery by Burns against Taylor of any part of the purchase price. Upon no theory can the instrument be construed as a sale *in praesenti*. As an agreement to sell *in futuro* it lacks the essential element of mutuality in that Taylor was not obligated to pay the purchase price or any part of it or even to effect a sale.

Again, the instrument expressly provides that in case Taylor should effect a sale the deed of conveyance should be made by Burns, which is an admission that the instrument was not to be construed as divesting Burns of his title, and that a conveyance from him would be necessary to vest his title in any purchaser. Not only does the contract fail to vest any title in Taylor but it does not contemplate that Taylor should ever acquire the title, it merely provides that upon the contingency of a sale to another brought about by his efforts or the joint efforts of himself and Burns, Taylor should share in the proceeds of such sale. Taking the instrument as a whole it appears that it was intended merely as a power of attorney, authorizing Taylor to effect a sale of the mines, upon the terms
154 mentioned, as the agent of Burns. Nor is this power of attorney one which, in legal effect, can be construed as being coupled with an interest in the mining claims so that it could not be revoked. There is nothing in the instrument which evidences an intention that Taylor should acquire an interest in the premises pending a sale of the same. Mention of future labor as part consideration is of no avail as conferring an interest, for it fails to bind Taylor to perform any work, nor does it state by whom this labor

was to be performed, when it was to be done, or of what it should consist. It is not even provided that Taylor should have any right of possession during the pendency of the sale or should pay any of the expense of the annual labor required by law. Manifestly the only interest which Taylor acquired under the agreement was the contingent one of sharing in the proceeds of the sale in case he should effect it. The interest which will render the power of attorney irrevocable must be in the subject of the power and not pertain to the power itself. As we have said there is nothing in the instrument, taken as a whole, which gave Taylor any interest in the mining claims. He did not have the right of possession. His sole interest related to the consideration or proceeds to be derived from the sale. His power, or agency, was not, therefore, in legal contemplation, one coupled with an interest.

In the case of Trickey *vs.* Crowe, 71 Pac. Rep. 968, this court declared, in speaking of a power of attorney coupled with an interest, that by "such interest is not meant an interest in that which
155 is produced by the exercise of power, but it must be an interest in the property on which the power is to operate." And further, that "the authority to sell on commission is not an authority coupled with an interest." We hold, therefore, that the agreement did not confer any title to or estate in the mines in question upon Taylor, and that the findings and decree of the trial court are correct.

The judgment will be affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur:
EDWARD KENT,
Chief Justice.
GEO. R. DAVIS,
Associate Justice.

(Endorsed:) No. 840. In the Supreme Court &c. Charles M. Taylor appellant, *vs.* Thomas Burns, *et al.* appellees. Opinion by Sloan, J. Recorded Book 6, Pages 5–9 Filed March 26, 1904. S. M. Cullom, Clerk.

156 In the Supreme Court of the Territory of Arizona.

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Sarah H. Sorin, being duly sworn, on oath says that she is one of the attorneys for Appellees in the above entitled cause, and that appellees' costs in said cause are as follows, viz:

For amount paid to the Clerk of the District Court for Transcript of Record, and copies hereof in said cause..... $.....
For Appellees' brief filed in said cause, 20 pages..... 20.00
For Supreme Court Clerk's fees, to date, in said cause..... 9.50
For Supp. Abstract of the Record filed by appellees, 23 pages 23.00

$52.50

SARAH H. SORIN.

Subscribed and sworn to before me this first day of April, 1904.
ARTEMISA KEEN,
[SEAL.] *Notary Public.*
My commission expires Jan. 14/1908.

(Endorsed:) No. 840. Supreme Court, Arizona. Charles M. Taylor appellant, *vs.* Tmomas Burns, *et al.* appellees. Cost Bill. Filed April 4, 1904. S. M. Cullom, Clerk.

157 In the Supreme Court of the Territory of Arizona.

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

Now comes William H. Barnes, attorney for the plaintiff and appellant in said cause and excepts to the bill of costs filed by the appellees as follows, to-wit:

1. Excepts to the item "For appellees' Brief filed in said cause, 20 pages, $20.00."

2. Excepts to the item "For Supp. Abstract of the Record filed by appellees, 23 pages, $23.00."

As to the first exception there is no authority to charge for the printing of a brief by appellee.

As to the second exception. The filing of a supplemental abstract was purely voluntary on the part of appellee, an abstract having been filed by appellant. Nothing was contained in the supplemental abstract which was not contained in appellant's abstract, no errors in said abstract were pointed out, and no order of the Court asked for and obtained requiring the filing of supplemental abstract. It was therefore purely voluntary on the part of appellees and cannot be made a proper charge against appel-
158 lant.

BARNES & MARTIN,
Attorney- for Appellant.

(Endorsed:) No. 840. In the the Supreme Court of the Territory of Arizona. Charles M. Tayolr, Appellant, *vs.* Thomas Burns, *et al.* Appellees. Exception to Bill if Costs. Filed April 12, 1904. S. M. Cullom, Clerk.

159 In the Supreme Court of the Territory of Arizona.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFFMAN, Respondents.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Eugene S. Ives, being duly sworn, says; that he is the attorney for the appellant, Charles M. Taylor, in the above entitled action; that this action was brought by the said appellant to quiet the title of said plaintiff against the said defendants and all persons claiming by, under or through them, to those certain mining claims situate in the California Mining District, in the Chiricahua Mountains in Cochise County, Territory of Arizona, to-wit,—the "Magnet" mining claim; the "Comet" mining claim; and the "Victor" mining claim; that the value of the said mining claims, as deponent verily believes, is upwards of two hundred thousand dollars.

EUGENE S. IVES.

Subscribed and sworn to before me this 13th day of March, A. D., 1903.

My commission expires May 29", 1907.

JOSIE B. HENDERSON,
[SEAL.] *Notary Public in and for Pima County, Arizona.*

(Endorsed:) No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thomas Burns, *et al.* Affidavit of Value. Filed Mch. 15, 1905. S. M. Cullom, Clerk.

160 In the Supreme Court of the Territory of Arizona.

No. 840.

CHARLES M. TAYLOR, Appellant,
vs,
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFFMAN, Respondents.

Application and Notice for Appeal.

The above-named appellant, Charles M. Taylor, conceiving himself aggrieved by the final judgment entered on the 26 day of March, 1904, in the above entitled action and court against him, the said appellant, and in favor of the said appellees, Thos. Burns, Jno. A. Duncan and S. R. Kauffman, does hereby appeal therefrom to the Supreme Court of the United States; and said appellant hereby prays that his appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES M. TAYLOR,
By EUGENE S. IVES,
His Attorney.

And now, to-wit, on the 15th day of March 1905, the above application having been duly presented and considered, it is
161 hereby ordered that the appeal above prayed for be allowed, and the same is hereby allowed on filing a good and sufficient bond for costs in the sum of one thousand dollars.

GEO. R. DAVIS,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 840. In the Supreme Court of the Territory of Arizona. Chas. M. Taylor, *vs.* Thomas Burns, *et al.* Application for and Allowance of, Appeal. Filed Mch. 15, 1905, S. M. Cullom, Clerk.

162 In the Supreme Court of the United States.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN and S. R. KAUFFMAN, Respondents.

Know all men by these presents: That we, Charles M. Taylor, as principal, and R. J. Adams and W. D. Beuhring, as sureties, are held and firmly bound unto Thos. Burns, Jno. A. Duncan and S. R. Kauffman in the full and just sum of one thousand dollars, to be paid to the said Thos. Burns, Jno. A. Duncan; to which payment well and truly to be made we bind ourselves our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1905.

Whereas, lately at a session of the Supreme Court of the Territory of Arizona in a suit pending in said court between Charles M. Taylor and Thos. Burns, Jno. A. Duncan and S. R. Kauffman, a final judgment was rendered against said Charles M. Taylor in favor of Thos. Burns, Jno. A. Duncan and S. R. Kauffman, and this appellant, Charles M. Taylor, has obtained an allowance of an appeal therefrom to the Supreme Court of the United States, and a citation directed to the said Thos. Burns, Jno. A. Duncan and S. R. Kauffman citing them to be and appear at a session of the Supreme Court of
163 the United States to be holden at Washington sixty days from the date of said citation;

Now, the condition of the above obligation is such that if the said Charles M. Taylor shall prosecute said appeal to effect and answer for all damages and costs if the said Charles M. Taylor fails to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES M. TAYLOR. [SEAL.]
R. J. ADAMS. [SEAL.]
W. D. BEUHRING. [SEAL.]

TERRITORY OF ARIZONA, *County of Pima, ss:*

R. J. Adams, and W. D. Beuhring, the sureties in the foregoing bond, being first duly sworn each for himself and not one for the

other, says; That he is worth the amount of one thousand dollars over and above his just debts and liabilities exclusive of property exempt from execution.

R. J. ADAMS.
W. D. BEUHRING.

Subscribed and sworn to before me this 15th day of March, A. D. 1905.

My commission expires May 29, 1907.

[NOTARIAL SEAL.] JOSIE B. HENDERSON.

The above bond being submitted to me was approved both as to form and sufficiency of sureties this 15th day of March, A. D. 1905.

164 EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

(Endorsed:) No. 840. In the Supreme Court of the United States. Charles M. Taylor, Appellant, *vs.* Thos. Burns, Jno. A. Duncan, and S. R. Kauffman, Respondents. Bond on Appeal. Filed Mch. 15, 1905.

165 In the Supreme Court of the Territory of Arizona.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN and S. R. KAUFFMAN, Respondents.

Findings of Fact.

In the above entitled proceeding the Supreme Court finds the facts to be as follows:

I.

That on the 27th day of February, 1900, the defendant, Thos. Burns, being a citizen of the United States, went upon the public domain of the United States, and having there made discoveries of mineral in place, proceeded to locate the three mining claims described in the complaint and in defendants' cross-complaint herein, to-wit, the Comet, Magnet and Victor; and upon said day posted at the point of discovery upon each of said claims a notice of location of the claim; that subsequently and within ninety days from said date of said location, said defendant, Burns, caused the discovery work to be done and completed upon each of said mining claims and marked the boundaries thereof; that thereafter, the said defendant caused to be made out and recorded in the office of the county recorder of Cochise County, on the 5th day of March, 1900, a

166 Notice of Location of each of said three mining claims, which notices of location, described the location and boundaries of said claims, respectively, and which are the notices of location mentioned and referred to in the complaint and cross complaint.

II.

That said Magnet, Comet and Victor mining claims are situate in the California Mining District, in the County of Cochise and Territory of Arizona.

III.

That during each of the years 1901 and 1902, said defendant Burns, performed not less than one hundred dollars' worth of labor or improvements upon each of said three claims.

IV.

That on November 9th, 1901, defendant Burns, made, executed and delivered to the defendant, John A. Duncan, a deed, conveying to said Duncan an undivided one-fourth interest of, in and to the said Magnet, Comet and Victor Mining Claims, which deed was recorded in the Recorder's Office in said Cochise County, on November 25th, 1901, in Book 14, Mining Deeds, at pages 302 and 303; that at the date and delivery of said deed, said Duncan had no knowledge of the instrument set forth in plaintiff's answer to defendants' cross-complaint.

V.

That on the 9th day of March, 1903, the defendants, Thos.
167 Burns, and John A. Duncan, entered into an agreement with the defendant, S. R. Kauffman, Trustee, for the sale of said three mining claims to said defendant, Kauffman, Trustee, which agreement was recorded in the Recorder's Office in said Cochise County, on March 11th, 1903, in Book 7, Miscellaneous Records, at page 251.

VI.

That defendant, Thos. Burns, ever since said twenty-seventh day of February, 1900, and defendant, John A. Duncan, ever since the 9th day of November, 1901, have remained continuously in possession of said three mining claims.

VII.

That on March 26th, 1901, the defendant, Thos. Burns, and the plaintiff, Charles M. Taylor, made, executed and delivered the instrument set forth in plaintiff's answer to defendants' cross-complaint, which instrument was recorded in the office of the Recorder of said Cochise County, on the 15th day of December, 1902, in Book 6, Miscellaneous Records, at pages, 474, 475 and 476 and which said instrument is in words and figures following, to-wit:

"This Memorandum of Agreement, made and entered into this 26th day of March, A. D. 1901, by and between Thos. Burns (a widower) of Cochise County, Arizona, the party of the first part, and Chas. M. Taybr, of Tucson, Arizona, the party of the second part,

168 Witnesseth: That the said party of the first part, in consideration of the sum of One Dollar, lawful money of the

United States of America, in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part, the said mining claims upon the terms and conditions following, to-wit:

The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part Forty-five Thousand Dollars (45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiaate the said mines, for a consideration in excess of said $45,000.00; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000.00, and may retain out of said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00. The said parties hereto, hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold, and the consideration realized as quickly as
169 possible, and the said party of the first part hereby agrees to execute any deed, or deeds, or conveyances that may be hereafter necessary to convey a good title to said mining claims, to whomsoever may purchase the same.

This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

In witness whereof, the said parties have hereunto set their hands this 26th day of March, A. D. 1901.

Executed in duplicate.

(S'd) THOS. BURNS.
(S'd) C. M. TAYLOR."

The foregoing "Findings of Fact" are approved.

HERRING & SORIN,
Att'ys for Respondent.

March 27th, 1905.

Allowed and signed this 30th day of March, 1905.

RICHARD E. SLOAN,
Associate Justice Presiding.

(Endorsed:) No. 840. Supreme Court, Arizona. Charles M. Taylor, Appellant, *vs.* Thos. Burns, Jno. A. Duncan and S. R. Kauffman, Respondents. Findings of Fact. Filed Mch. 29, 1905. S. M. Cullom, Clerk.

170 In the Supreme Court of the United States.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFFMAN, Respondents.

Affidavit of Service.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Josie B. Henderson, being duly sworn, deposes and says: that she is over the age of 21 years; that she is a clerk in the office of Eugene S. Ives, attorney for appellant in the above entitled action; that she served a citation of which the annexed is a copy upon Messrs. Herring & Sorin, attorneys for the respondents, by delivering a copy thereof to and leaving the same with William Herring, one of the said firm, at his office in the city of Tucson, on the 17″ day of March, 1905.

JOSIE B. HENDERSON.

Subscribed and sworn to before me this 27″ day of March, 1905. My commission expires Jan. 14, 1908.

ARTEMISA KEEN,
[SEAL.] *Notary Public.*

171 In the Supreme Court of the United States.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFFMAN, Respondents.

Citation.

The United States of America to Thos. Burns, Jno. A. Duncan, and S. R. Kauffman, appellees, Greeting:

You and each of you are hereby cited and admonished to be and appear at the session of the Supreme Court of the United States, to be holden in the city of Washington, District of Columbia, on the 15″ day of May, 1905, pursuant to an appeal duly allowed by the Honorable George R. Davis, Justice of the Supreme Court of the Territory of Arizona, on the 15th day of March, 1905, and duly filed with the clerk of the said Court, from a judgment rendered in said Supreme Court of the Territory of Arizona, on the 26 day of March, 1904, in an action on appeal to that court from the District Court of Cochise County, in said Territory of Arizona, wherein you and each of you were appellees, and said Charles M. Taylor was appellant, to show cause, if any there be, why the said judgment

rendered against the said appellant and in your favor, should
172 not be set aside, reversed and corrected; and why speedy justice should not be done to the party in whose behalf the said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15 day of March, A. D., 1905.

(Signed) GEORGE R. DAVIS,
Justice Supreme Court, Territory of Arizona.

(Endorsed:) No. 840. Supreme Court, United States. Chas. M. Taylor, Appellant, *vs.* Thos. Burns, *et al.*, Respondents. Citation and proof of service. Filed M'ch 29, 1905. S. M. Cullom, Clerk.

173 In the Supreme Court of the United States.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN, and S. R. KAUFFMAN, Respondents.

Assignment of Errors.

The plaintiff-appellant herein assigns the following errors committed by the Supreme Court of the Territory of Arizona.

I.

The Supreme Court erred in affirming the erroneous finding of the District Court, that the instrument executed on March 26, 1901, between Thos. Burns and Charles M. Taylor was and is without force or effect to vest in plaintiff-appellant any estate, right or title in or to the Magnet, Comet or Victor Mining Claims.

II.

The Supreme Court erred in affirming the erroneous finding of the District Court, that the defendants-appellees are entitled to a decree against the plaintiff-appellant as prayed for in the cross-complaint, to quiet the title of the defendants-appellees to the mining claims and premises described in the complaint, against plaintiff-appellant, and declaring and adjudging that the plaintiff-appellant has no estate, right, title or interest in or to the said mining claims or either of them.

174 III.

The Supreme Court erred in affirming the erroneous finding of the District Court, that the plaintiff-appellant be barred and forever estopped from having or claiming any right or title to the premises adverse to the defendants-appellees.

IV.

The Supreme Court erred in affirming the order of the District Court, denying the motion for a new trial, for the reasons set forth in said motion.

V.

The Supreme Court erred in affirming the order of the District Court, denying the motion to set aside the judgment of the District Court, on the ground that the evidence did not sustain the same.

VI.

The Supreme Court erred in affirming the judgment of the District Court rendered in favor of the defendants-appellees and against the plaintiff-appellant, quieting the title of the defendants-appellees against all claims, or pretentions of the plaintiff-appellant, and adjudging that the plaintiff-appellant be barred and forever estopped from having or claiming any right or title to the premises described in the complaint, or any part thereof, adverse to the defendants-appellees.

VII.

175 The Supreme Court erred in affirming the sixth finding of fact of the District Court, to-wit, that the defendants-appellees Thos. Burns and Jno. A. Duncan, had ever since the 9" day of November, 1901, been continuously in possession of the said three mining claims, for the reason that the uncontradicted evidence is that, during a portion of said times Burns was working upon the claims under a salary from Taylor.

VIII.

The Supreme Court erred because it failed to reverse the judgment of the District Court by reason of the fact that the said District Court committed material error in ruling upon the admission and rejection of evidence as follows:

a. In excluding the following document offered by the plaintiff and marked "Plaintiff's Exhibit B:"

"Know all men by these presents: that we, Walter Beuhring and Charles M. Taylor, of the city of Tucson, County of Pima, and Territory of Arizona, in consideration of the sum of One Dollar ($1.00), to us in hand paid by Thos. Burns, of the County of Cochise, Territory of Arizona, receipt whereof is hereby acknowledged, have forever released and discharged, and by these presents forever release and discharge the said Thos. Burns, his executors, administrators and assigns, from all claims, rights, liens, charges, debts, dues, demands, suits, legal or equitable, and judgments, from the beginning of the world to the date of these presents, which we in any manner, own, have, hold or claim against the said Thos. Burns, for or on account of, or in any manner in relation to, the following described mining premises and property, situated in the California Mining District, in the County of Cochise, as follows, to-wit: Henly, Maddox

and Ray, and also Mars, located April 1st, 1900, the certificate of location whereof is of record in Book 15, Records of Mines at page 80. Ajax, located April 1st, 1900, the certificate of location whereof is of record in Book 15, Records of Mines, at page 52. Comet located February 27th, 1900, the certificate of location whereof
176 is of record in Book 15 Records of Mines, at page 77. Magnet, located February 27th, 1900, the certificate of location whereof is of record in Book 15, Records of Mines, at page 76. Victor, located February 27th, 1900, the certificate of location whereof is of record in Book 15, Records of Mines at page 78. Atlas, located February 27th, 1900, the certificate of location whereof is of record in Book 15, Records of Mines, at page 75. Venline located —, the certificate of location whereof, is of record in Book —, Records of Mines, at page —.

In witness whereof, we have hereunto set our hands and seals this 26th day of March, A. D., 1901.

(S'd) WALTER D. BEUHRING.
[SEAL.] (S'd) CHARLES M. TAYLOR."

b. In sustaining defendants' objection to plaintiff's offer to prove that at the time of the execution of the contract between Taylor and Burns of date March 26, 1901, the said document (Plaintiff's Exhibit "B") was signed showing consideration for the said agreement of March 26, 1901.

c. In sustaining the defendants' objection to the following questions propounded to the defendant Burns:

Q. Was plaintiff (Taylor) on the ground during that year, (1900)?

Q. Did you receive a paper signed by Mr. Beuhring and Mr. Taylor giving you a release of all obligation up to date?

Q. Now, in the year 1901, didn't you make some further locations in the neighborhood of these locations mentioned in this case, in your own name?

Q. Was not the location work on those other claims done by Mr. Taylor and his men?

Q. Did not Mr. Taylor make locations adjoining and in
176½ the neighborhood of these claims in 1900 and 1901 in his own name, and do the location work upon them, and was it not a fact that at the time the contract of March 26" was made, Mr. Taylor released to you all claims for money he had advanced to you for those locations adjoining these properties, and took this contract of March 26" in settlement of that?

Q. Did not Mr. Taylor do for you alone $1,000. worth of work on said mines in 1900 and 1901, which was released as a part consideration for the contract of March 26" in this case?

Q. Did not Mr. Taylor do over $3,000. worth of work, either himself or as a representative of Mr. Randolph, in 1900 and 1901, and was not the release of that work part of the consideration of this contract of March 26, 1902?

Q. Have you ever yourself done $500. worth of work on those three mining claims sued on in this case?

Q. What was the consideration of the contract of March 26, 1901, which you say is revoked?

d. In sustaining defendants' objection to plaintiff's offer to prove that Burns had never done $10. worth of work on those claims; that Mr. Randolph's money went into the making of those claims; and this contract was made in order that Mr. Randolph might get a chance to reimburse himself.

J. In denying the motion of plaintiff-appellant to strike out from the record that certain document which was offered in evidence and called a "Revocation," and which is known as "Defendants' Exhibit No. 2."

177 *f.* In sustaining defendants' objection to plaintiff's offer to prove that there was nearly 300 feet of tunnel work done on the property by Taylor, and that there was a shaft sunk upon the property of over 50 feet, and a drift upon that of over 20 feet.

g. In sustaining the objection of the defendants to the following questions propounded to the plaintiff:

Q. Did you at the time of the execution of the contract which has been offered in evidence here, dated March 26, 1901, as part of the consideration of that contract, release Mr. Burns from all obligation for prior indebtedness for work done upon these claims?

Q. State whether or not you at the time, and as part consideration for the contract of March 26", abandoned and released to Mr. Burns the mining claims in the neighborhood of these claims?

Q. State whether or not that other claim was a valuable claim and worth several thousand dollars?

Q. You may state in full what was the consideration which moved from you to Mr. Burns for the contract of March 26, 1901.

Q. At the time of the execution of the contract of March 26", contemporaneous with it and as a part of it, was a document executed by you and one Beuhring and delivered to Mr. Burns?

Q. I show you a certified copy of a document marked "Plaintiff's Exhibit B" as offered, state whether or not that paper

178 was executed by you and Walter D. Beuhring contemporaneous with the contract of March 26, 1901, and delivered to Mr. Burns?

Q. Was the Beuhring named in that document interested with you and associated with you in furnishing part of the money, if any was furnished, for the work done upon the claims other than those sued for in this case, for which Mr. Burns owed you money?

Q. Who was in possession of these three claims sued for in this case during the time you did work upon those claims?

Q. During that time (March 1900 to March 1902) was Mr. Burns in your employ on the ground?

Q. During that time, state whether or not you paid him (Burns) a salary of $100. a month for a portion of the time acting as your foreman or employed on that ground?

Q. State whether or not he was there in the capacity of exclusive owner, or there in the capacity of owner, or as an employee of yours?

Q. Were other claims besides these claims sued for in this action,

referred to in that letter (Letter Taylor to Burns dated February 23, 1903, being defendants' "Exhibit No. 1")?

Q. Were you at the time endeavoring to sell this property?

Q. Now, when you state in that letter that unless he fixes a price on these properties, you will sell these claims, the Comet, Victor and Magnet, did that refer to this contract of March 26"?

Q. Did Mr. Burns put any obstacle in the way of your
179 selling these mines?

Q. Did Burns render you any assistance when called upon, in selling these mines? If so, state what assistance he rendered.

All of which is respectfully submitted.

EUGENE S. IVES,
Attorney for Plaintiff-Appellant.

(Endorsed:) No. 840. Supreme Court, United States. Charles M. Taylor, Appellant, *vs.* Thos. Burns, Jno. A. Duncan and S. R. Kauffman, Respondents. Assignment of Errors. Filed M'ch 30, 1905. S. M. Cullom, Clerk.

180 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit, the 12th day of January A. D., 1904, the same being one of the regular judicial days of the January Term, A. D., 1904, of said Court, the follow order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

On Motion of William Herring, Esq., attorney for appellees herein, It is ordered that this cause be set for oral argument Monday, January 18th, 1904.

And afterwards and upon to-wit the 18th day of January, A. D. 1904, the same being one of the regular judicial days of the January Term A. D., 1904, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

181 No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

On motion of Webster Street, Esq., for appellant, It is ordered that Appellant be granted permission to add additional citations on page 18 of his brief.

And afterwards and upon to-wit the 18th day of January, A. D. other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

This cause coming on for hearing was argued by Mrs. Sarah I. H. Sorin for appellees, and cause ordered submitted.

And afterwards and upon to-wit the 26th day of March, A. D. 1904, the same being one of the regular judicial days of the January Term A. D., 1904 of said Court, the following order, *inter alia* was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

182 No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS, JOHN A. DUNCAN, and S. R. KAUFFMAN, Appellees.

(*Judgment.*)

This cause having been heretofore submitted and by the Court taken under consideration and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the trial court be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the Appellees herein do have and recover of and from Charles M. Taylor Appellant herein, and Epes Randolph and H. B. Tenney, sureties on Appeal Bond herein, their costs in this court taxed at Fifty-two and 50/100 ($52.50) dollars, and their costs in the court below in this cause incurred.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

183 Comes now W. H. Barnes, Esq., Attorney for Appellant herein, in open court and gives notice of appeal from the judg-

ment of this court, to the Supreme Court of the United States, and moves the Court that the appeal be allowed and that it fix the amount of the cost bond on appeal.

It is ordered by the Court that the appeal be allowed and It is further ordered that the amount of the cost bond be fixed in the sum of one thousand ($1,000.) dollars.

And afterwards and upon to-wit the 6th day of May A. D., 1904, the same being one of the regular judicial days of the January Term A. D., 1904, of said Court, the following order *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

At this day it is ordered that Appellant's Exception to Bill of Costs filed herein by Appellees, be and the same is hereby submitted.

And afterwards and upon to-wit the 7th day of May A. D., 1904, the same being one of the regular judicial days of the January Term A. D., 1904, of said Court, the following order,
184 *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS ET AL., Appellees.

In this cause, it is ordered that Appellant's Exceptions to Bill of Costs filed herein by Appellees, and heretofore submitted, be and the same is hereby overruled.

And afterwards and upon to-wit the 29th day of October A. D., 1904, the same being one of the regular judicial days of the January Term A. D., 1904, of said Court, the following order *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 840.

CHARLES M. TAYLOR, Appellant,
vs.
THOMAS BURNS, JOHN A. DUNCAN, and S. R. KAUFMAN, Appellees.

Comes now Webster Street, Esq., for W. H. Barnes, Esq., attorney for Appellant herein, in open court, and gives notice of appeal from the judgment of this Court, to the Supreme Court
185 of the United States, and moves the Court that the appeal be allowed.

It is ordered by the Court that said motion be granted, and the appeal be and the same is hereby allowed.

It is further ordered that the amount of the cost bond be fixed in the sum of One Thousand ($1,000.) dollars.

186 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 185, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Charles M. Taylor, Appellant, against Thomas Burns, John A. Duncan and S. R. Kaufman, Appellees, as the same remain of record and on file in said office.

I further certify that the citation attached hereunto, is the original citation issued by said Supreme Court of the Territory of Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 2nd day of May, 1905.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

187 In the Supreme Court of the United States.

Citation.

CHARLES M. TAYLOR, Appellant,
vs.
THOS. BURNS, JNO. A. DUNCAN and S. R. KAUFFMAN, Respondents.

The United States of America to Thos. Burns, Jno. A. Duncan and S. R. Kauffman; Appellees, Greeting:

You and each of you are hereby cited and admonished to be and appear at the session of the Supreme Court of the United States, to be holden in the city of Washington, District of Columbia, on the 15th

day of May 1905, pursuant to an appeal duly allowed by the Honorable Geo. R. Davis Justice of the Supreme Court of the Territory of Arizona, on the 15th day of March, 1905, and duly filed with the clerk of the said court, from a judgment rendered in said Supreme Court of the Territory of Arizona, on the 26 day of March, 1904, in an action on appeal to that court from the District Court of Cochise County, in said Territory of Arizona, wherein you and each of you were appellees, and said Charles M. Taylor was appellant, to show cause, of any there be, why the said judgment rendered against the said appellant and in your favor, should not be set aside, reversed and corrected, and why speedy justice should not be done to the party in whose behalf the said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of
188 the Supreme Court of the United States, this 15th day of March, A. D. 1905.

GEO. R. DAVIS,
Justice Supreme Court, Territory of Arizona.

[Endorsed:] No. 840. In the Supreme Court, of the Territory of Arizona. Chas. M. Taylor, *vs.* Thomas Burns, *et al.* Citation. Filed March 15, 1905. S. M. Cullom Clerk.

Endorsed on cover: File No. 19,776. Arizona Territory Supreme Court. Term No. 275. Charles M. Taylor, appellant, *vs.* Thomas Burns, John A. Duncan, and S. R. Kauffman. Filed May 26th, 1905. File No. 19,776.

FILE COPY.

FILED
MAR 26 1906
JAMES H. MCKENNEY,

BRIEF.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 1[illegible]5.28

CHARLES M. TAYLOR, APPELLANT,

vs

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFFMAN, RESPONDENTS.

(19,776)

EUGENE S. IVES,

Counsel for Appellant.

IN THE

Supreme Court of the United States.

CHARLES M. TAYLOR,
Appellant.

vs.

THOS. BURNS, JNO. A. DUNCAN,
and S. R. KAUFFMAN,
Respondents.

October Term, 1905.
No. 275.

STATEMENT OF THE CASE.

The appellant brought suit in the District Court of Arizona against the respondents to quiet title to three mining claims known as the Victor, Magnet and Comet, situate in Cochise County, Arizona.

In February, 1900, the defendant, Thomas Burns, located these claims. The plaintiff, Charles M. Taylor, and his associates, after such location and prior to March, 1901, under some sort of a contract or agreement with Burns, expended a great deal of money developing these claims (Transcript, pages 48, 49 and 50). The exact nature of such contract, and the character and extent of the work done and amount of money expended upon the claims are not disclosed, the Court, upon defendant's objection, having excluded the plaintiff's testimony with respect thereto (Transcript, pages 62, 63 and 64).

On the 26th of March, 1901, the plaintiff and the defendant Burns, entered into the following contract:

"This Memorandum of Agreement, made and entered into this 26th day of March, A. D. 1901, by and between Thomas

Burns (a widower), of Cochise County, Arizona, the party of the first part, and Charles M. Taylor, of Tucson, Arizona, the party of the second part,

"Witnesseth: That the said party of the first part in consideration of the sum of one dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and consideration following, to-wit:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, Forty-Five Thousand Dollars ($45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000.00; that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of $45,000.00 and may retain out of the said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims. This contract is to take the place of and supercede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

"In witness whereof, the said parties have hereunto set their hands this 26th day of March, A. D. 1901.

"Executed in duplicate.

"(Sd) THOS. BURNS.
"(Sd) C. M. TAYLOR."

The only question involved upon this appeal is the construction to be given to this agreement. The contention of the appellant is that the document vested in him for a good and valid consideration an interest in the three mining claims.

The contention of the appellees is that the document amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement and that it is revocable at will.

It appears from the record that the trial Judge at the outset accepted the defendant's view of the document. He deemed it free from ambiguity and and excluded all evidence tending to explain or throw light upon it. To these rulings plaintiff duly accepted. If, therefore, it should be ascertained that the document either transfers to the plaintiff an interest in the claims, as the appellant will contend, or is even so ambiguous as under the rule to call for explanation by outside testimony, the judgment should be reversed. It will, therefore, be unnecessary to consider in detail the exceptions to the rulings of the Court upon evidence; for the materiality of the evidence offered and excluded depends upon the determination as to whether or not the document is ambiguous.

ARGUMENT.

I.

It is conceded, as stated by the learned Justice of the Supreme Court, in the opinion of that Court affirming the judgment of the District Court, that

> "It is a settled rule of construction of instruments of this charicter that the intention of the parties must govern as this intention is evidenced by a consideration of the entire instrument * * * That the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them."

The learned Justice, continuing, says:

> "Taking the instrument as a whole, it appears that it was intended merely as a power of attorney authorizing Taylor to effect a sale of the mines upon the terms mentioned, as the agent of Burns. Nor is this power of attorney one which in legal effect can be construed as being coupled with an interest in the mining claims, so that it cannot be revoked. There is nothing in the instrument which evidences an intention that Taylor should acquire an interest in the premises pending a sale of the same."

It is with the last quoted portion of the opinion that the appellant takes issue.

II.

The document is clumsily worded. The appellant contends, however, that it clearly expresses the intention of the parties to it to establish in each other's rights with respect to the mining claims as follows:

First and foremost: Burns was to have an interest in all of the claims to the extent of $45,000 net, prior to any interest of Taylor whatsoever.

Second: Subject to such prior interest of Burns, Taylor was to be the owner of an undivided seven-eighths interest in the premises.

Third: Subject to such $45,000 claim of Burns, Burns was to be the owner of an undivided one-eighth interest in the premises.

Fourth: In consideration of such seven-eighths interest subject to such $45,000 prior claim ,Taylor was to surrender and abandon whatever interest of any kind or character he may have had prior to the execution of the document.

Fifth: In consideration of Taylor's surrendering his rights, whatever they may have been under prior contracts, Burns was to give Taylor the right perpetually to sell the entire eight-eighths interest in the property, with the sole limitation that he should not make such sale for less than $45,000.

Sixth: The parties were in good faith to help each other to effect a sale.

In fine, the document vested Taylor with two rights:

FIRST: A seven-eighths interest subject to the $45,000 claim; and

SECOND: The right to sell, not only his seven-eighths interest, but also the one-eighth interest of Burns, at a price satisfactory to Taylor, provided the price was not less than $45,000. Burns retained his prior claim against the entire property to the extent of $45,000, but by virtue of the document was obligated to let his remaining one-eighth interest be sold at any price for which Taylor was willing to sell his seven-eighths interest.

III.

It is submitted that the above construction of the agreement gives full efficacy to every word in it and makes each portion of the agreement harmonious and consistent with all its other portions.

The language in the agreement: "The party of the first part in consideration of the sum of One Dollar * * * and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim * * * sells to the said party of the second part the said mining claims," imports absolutely the establishment in Taylor of an interest in such claims. This language cannot be disregarded unless it be ascertained to be inconsistent with other language in the agreement; and even in that event it would raise such an ambiguity as would render admissible in evidence outside testimony with respect to the intent of the parties.

As has been said, however, it is not inconsistent with any subsequent portions of the document. If there had been nothing else in the agreement, the above language would have been sufficient to assure to Taylor either an equitable or legal title to the entire mining claims, and he would have had the right to sell them or to give them away.

The succeeding paragraph of the agreement qualifies it and makes manifest the true interest intended to be transferred to Taylor.

The interest which Burns is to retain is set forth first. Whenever Taylor shall sell the mines he is to pay "Burns $45,000, and in addition thereto one-eighth of whatever price" he may be able to secure in excess of said $45,000.

It is submitted that by virtue of this clause Burns had a lien equivalent to an equitable mortgage upon the premises to the extent of $45,000, and was co-tenant with Taylor, Burns owning one-eighth and Taylor seven-eighths. This seven-eighths ownership of Taylor's was vested and indefeasible.

It could not be argued, however, that Burns was necessarily at Taylor's mercy and without remedy. It is believed that a court of equity, upon a proper showing, would have permitted Burns to foreclose his equitable mortgage or lien, or else force the payment to himself of such $45,000. The sets of facts necessary to constitute such a showing are indefinite in number and variety and need not be suggested.

IV.

"That is to say," the agreement continues, "the party of the [illegible] part is authorized to sell and negotiate the said mines for any price above the sum of $45,000, and may retain out of the said purchase price seven-eighths of said selling price above said sum of $45,000."

This paragraph makes clear the entire document. But for it Taylor could not have contracted to sell Burns' one-eighth interest and would have had no legal redress other than the ordinary suit for partition. The negotiations between Taylor and Burns consummated in this paragraph. By it the full sum of $45,000 was first assured to Burns. With that amount safe and secure, Burns agreed that Taylor might sell Burns' one-eighth along with his own seven-eighths upon any basis satisfactory to Taylor.

V.

Next in the document follows the mutual agreement that the parties will aid each other to sell the claims. They express that their mutual desire is not to equip and operate the mines, but to sell them; that their co-tenancy is not to develop into a co-partnership of mine operators. Their intent is to sell and realize "as quickly as possible." It may be remarked in this connection that had Burns asked a court of equity to foreclose his equitable interest on the ground that time had passed and nothing had been done, and no sale consummated, this clause would

have had weight with the Court in finding a rather short time to be a reasonable time.

VI.

Next the document provides:

"The party of the first part hereby agrees to execute any deed or deeds or conveyances as may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."

The learned Justice delivering the opinion of the Supreme Court of the Territory, referring to this clause, says that "it is an admission that the instrument was not to be construed as divesting Burns of his title, and that a conveyance from him would be necessary to vest his title in any purchaser."

It would seem from this observation that the learned Justice of the Supreme Court had not studied the document with due care. Of course, it was necessary that Burns should execute a deed or deeds of conveyance. A deed signed by Taylor alone to a purchaser (granting the document to be in the nature of a conveyance), would not have conveyed such a title to the property as would have been satisfactory to any purchaser.

Burns unquestionably owned a one-eighth undivided interest. He also unquestionably owned a $45,000 interest in the claims, whatever may have been the legal nature of such interest. No purchaser would have accepted title unless Burns had joined in the conveyance. The gist of the document was that Taylor should have the absolute right in his own discretion to sell not only his seven-eighths, but also Burns' one-eighth, subject only to the $45,000 limitation. This paragraph was inserted in order to render effective such right so granted to Taylor to sell. The paragraph is not only not inconsistent with the theory that the instrument transfers an interest to Taylor, but confirms and strengthens such theory.

VII.

But one paragraph of the document remains to be considered. It is as follows:

> "This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims."

This clause was the impulse and the consideration of the document. The nature of such contract, the Court, as has been stated, would not suffer the plaintiff to prove. The District Court and Supreme Court of the Territory both held that the document "was intended merely as a power of attorney authorizing Taylor to effect a sale as the agent of Burns" and that it was revocable at will.

It is inconceivable that such could have been Taylor's intent. If the theory of the lower courts be true, then whatever rights Taylor had prior to March 26, 1901, he threw away without consideration or necessity for so doing when he executed the document of March 26th. If revocable at will, Burns could have revoked it the next week, or the next day, and Taylor's interest was gone. To hold that Taylor intended this is, it seems to us, an absurdity.

VIII.

If the theory of the respondents and of the Arizona courts be true, Taylor's rights were those of a broker, and his interest merely a commission contingent upon his effecting a sale. Such a theory does violence to the language of the instrument.

A broker's commissions are compensation rendered for services as the agent of the owner in procuring a purchaser. Such were not the services which Taylor had performed and

agreed that he would continue to perform, and which were the consideration mentioned in the instrument.

> "The party of the first part in consideration of One Dollar * * * and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet, Comet and Victor claims," etc.

The services and labor were not to be rendered in negotiating or effecting a sale. The labor was to be expended in and upon the claims themselves. The alleged instrument of revocation was executed by Burns in 1903. Taylor was not permitted to prove what labor he had expended upon these claims either prior to March 26, 1901, or subsequent thereto, and prior to 1903. If there had been any understanding between Taylor and Burns as to what labor Taylor agreed to expend upon the claims, and Burns had felt that Taylor was not expending upon them the required amount of labor, he might have had an action of some kind or character against Taylor. He might have asked the courts to declare the instrument a conditional sale, and to decree a forfeiture. None of these matters, however, are involved in this appeal. It is not claimed that Taylor did not render full consideration.

The document itself expressly precludes the notion that the services to be rendered by Taylor as a consideration for this document were the services of a broker. The consideration of the transfer is plainly expressed without ambiguity in the clause last quoted. Burns "sells" the property in consideration of One Dollar and certain labor performed and to be performed. Subsequently in the agreement, and not as a part of the consideration for such sale, the parties mutually agree to aid each other in the negotiation and sale of the claims. Taylor was no more of a broker for Burns than Burns was for Taylor. They both agreed to negotiate a sale; neither was entitled to any commission as against the other, or any payment

for services rendered in negotiating a sale. Each was obligated to render such services and could not obtain pay therefor. The agreement establishes conclusively that both sides wanted to sell, and this mutual desire prompted the mutual agreement to render aid in negotiating or effecting a sale.

IX.

It was contended, before the lower Courts, that the granting word in this contract, viz: the word "sell," ("said Burns SELLS to said party of the second part said mining claims") is not a word of conveyance but is applicable only to personal property, and is not a word which can be used or can be construed as giving any title or right to a mining claim. This we deny. But for the Statute of Frauds, Sec. 2708 Revised Statutes of Arizona, 1901, which makes the term "real estate" under the Statute of Frauds to include mines and mining claims, mining claims could be sold orally. The Statute of Frauds requires that a contract for a sale of real estate shall be in writing, and includes mining claims, under the head of real estate in that title. This title simply provides that such contracts shall be in writing, and is not authority for the form of the document. Mining claims may be sold by bill of sale so far as that statute is concerned. It is held in:

Table Mountain T. Co. v. *Stranahan*, 20 Cal., 198.

That mining claims can be transferred orally. The Statutes of California afterwards required them to be in writing. In the absence of such a statute an oral transfer would be good. This has been also held in:

Union Con. M. Co. v. *Taylor*, 100 U. S., 37, and
Lockhart v. *Rollins*, 21 Pac., 413.

Where the statute requires a deed for a transfer of mining property, the statute would, of course, govern. The Arizona

statute of conveyance, Title XII, page 299, Sec. 1, says that no estate or freehold, etc., in land or tenements shall be conveyed unless the conveyance be declared by an instrument in writing. The other sections refer to real estate. Sec. 13 says: "The term land in this title shall include mines and mining claims."

A mining claim is not an estate of any of the Tenures known to common law. It is not an estae in fee. It is land owned by the United States, in which the United States permits citito acquire certain rights upon certain conditions. These rights so acquired, become very valuable often times, and the rights of a citizen who has complied with the acts of Congress, are as complete as though he owned in fee simple, but it is merely a license granted by the Government. "They are subject to bargain and sale." "They are property in the fullest sense of the word." "May be sold, transferred, mortgaged and inherited."

Justice Miller in:

Forbes v. *Gracey*, 94 U. S., 762,
Belk v. *Meager*, 104 U. S., 279.

says actual possession is not necessary for the protection of title acquired by valid location, it is simply the right to possession while the paramount title remains in the United States.

Such a right is transferred by the term "sell" without any regard to the character of the fee or of the title, and the word sell in a contract is a word of assignment of all the right to possession of the party who is the seller, and the ordinary words of conveyance, "grant, bargain and sell" are not required. The terms grant and bargain are not necessary, because the term of sell implies and carries with it all right of the locator to the possession of the claims.

2 *Kent's Com.* 468:—"Sale is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property

for money, which the buyer pays or promises to pay to the seller for the thing bought and sold." By this contract therefore Taylor acquired a vested interest in the mining claims. It had all the solemnities of a conveyance. It was acknowledged at the time of its execution so as to give it the right of record, and afterwards was recorded.

The words "a widower" in the very opening of the agreement, "This agreement * * * by and between Thomas Burns, a widower," are conclusive that the parties intended it to be a conveyance. If a mere agreement with a broker it would have been of no consequence whether Burns was married or not. The addition of the words "a widower" showed that the parties intended to make the instrument effective to cut off the rights of a grantor's wife, if any.

XI.

Whatever the Court may decree this instrument to be it certainly did vest in Taylor a right coupled with an interest, and, therefore, was not revocable at the will of Burns.

> *Hunt* v. *Rousmaniers Admrs.*, 8 Wheaton, 175, and also in *L. C. P. Co.*, 589.

That a power of attorney coupled with an interest is irrevocable, and binds the party giving it, and may be executed after his death, see the note to this case. Where an authorization or power of attorney is coupled with an interest, or where it is given for valuable consideration, it is from its own nature and character irrevocable.

> *Napp* v. *Alvord*, 10 Paige, 205.
> *2 Kent Com.*, 643.
> *Bony* v. *Smith*, 17 Ill., 533.
> *Raymond* v. *Squire*, 11 John. 47.

If this be true, the Court erred in holding that this document gave no right to these mining claims to Chas. M. Taylor, and in decreeing that he had no interest whatever in the same. From the findings of the Court itself, that this contract was made, executed and delivered by Burns to Taylor, and then concluding as a matter of law that Taylor had no interest in the said mining claims, and quieting the title of Burns as against Taylor and all persons claiming under, by or through him, appears an error, for which the case ought to be reversed.

XII.

If the Court should find that Taylor acquired an interest by virtue of his contract of March 26, 1901, then such interest is superior to the title alleged to have been acquired by the defendants, Duncan and Kauffman. The answers and cross-complaints of such defendants do not set forth facts sufficient to establish rights as bona fide purchasers without notice.

It was held by the United States Supreme Court in *Boone* v. *Chiles*, 10 Peters, at pages 211 and 212, that such pleading

> "must state the date of purchase, state the purpose and contents briefly, that the vendor was seized in fee and in possession. The consideration must be stated *with a distinct averment that it was bona fide and truly paid independently of the recital in the deed.* Notice must be denied previous to and down to the time of paying the money and to the delivery of the deed * * *Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice. The case stated must be made out. Evidence will not be permitted to be given of any other matter not set out * * * Such are the privileges of innocent purchasers and such the guards against those who may assume their character in courts of equity."

On this point the Supreme Court of Arizona found as follows:

> "That on February 19, 1901, defendant Burns made, executed and delivered to the defendant, John A. Duncan, a deed conveying to said Duncan an undivided one-fourth interest of, in and to the said Magnet, Comet and Victor mining claims * * * That at the date and delivery of the said deed, said Duncan had no knowledge of the instrument set forth in plaintiff's answer to defendant's cross complaint." (Transcript, Finding 4, p. 79.)

A large number of cases affirm the rule as laid down by this Court in the case of *Boone* v. *Chiles*.

> *Smith* v. *Orton*, 131 U. S., p. 78.
> *Simmons* v. *Doran*, 142 U. S., p. 437.
> Davis v. Ward, 109 Calif., 189.
> *Ferguson* v. *Dent*, 24 Fed., 435.
> *Laraway* v. *Larue*, 63 Iowa, 412.
> *Prickett* v. *Muck*, 74 Wis., 207.

It cannot be claimed that the plaintiff admitted of record that the defendant Duncan was an innocent purchaser. It appears that the counsel for the plaintiff examined the defendant, Burns, as to whether he had told Duncan of the document of March 26, 1901, and Burns answered that he had. The witness testified he told Duncan a few months after he had conveyed the one-fourth interest to Duncan.

The counsel for the plaintiff then said (Transcript, p. 39):

> "By Mr. Barnes: I find that I will have to abandon my claim against Mr. Duncan. I am satisfied that I cannot prove his actual knowledge. I thought I could by Mr. Burns, but I find that I cannot do it.

"By the Court: You dismiss as to Duncan?

"By Mr. Barnes: No, I won't dismiss; I will leave it as it is. I will say that I do not dispute his right to an undivided one-fourth interest."

It is respectfully contended that this language cannot be construed as an admission of record. The answer of Judge Barnes to the interrogation of the Court in which he said: "No, I won't dismiss," is conclusive that no admission of record was made. The observations of Judge Barnes were in the nature of an argument or discussion. It would appear that he was not familiar with the rule, and that he indicated to the Court that he did not think much of his chance of prevailing against Duncan; but when the Court, evidently familiar with the rule, did not suffer Duncan to assume the position of an innocent purchaser and asked Barnes if he dismissed as against Duncan, Barnes refused to do so.

This view of the colloquy is corroborated by a statement made by Barnes during the examination of Duncan himself. It appears at page 56 of the transcript. The counsel for Duncan offered in evidence the deed from Burns to Duncan, marked Exhibit 5. The counsel said: "We offer this deed in evidence."

"By Mr. Barnes: We admit that a deed was made, but we claim that it was subject to our interest. (Mr. Herring hands the document to Mr. Barnes.) No, no objection to that."

This occurred subsequent to the alleged admission, and is conclusive,

First: That Barnes did not admit that Duncan was an innocent purchaser; and

Second: That the counsel for Duncan was not misled by the statement which Barnes had previously made; or that if he had

been misled up to this point of the trial, this last statement of Barnes set him right.

XIII.

The Court erred in not allowing Taylor to show that contemporaneous with this contract there were executed releases of all prior obligations of Burns to Taylor and also a surrender of all powers of attorney and other documents previously held by him from Burns. All these things tend to show the magnitude of the consideration, what the consideration was, and throw light upon the purpose and intention of the document. They in no way tend to vary or affect its terms in any particular, and they were competent evidence by all the rules of evidence. See:

> *Greenleaf on Evidence*, Sec. 285, and cases cited.
> See also Sec. 304, and cases cited.

The distinction is that such evidence does not vary the contract or alter its obligations. It is rarely that the Court will see a case where there is a sharp and distinct conflict in the contention of the parties, and where the Court takes such a complete and overwhelming view of the case. The Court seemed to take it for granted that this was a mere power of attorney, and revocable, and had been revoked, and that ended it, no matter what the consideration was, and gave a construction to this document which made it a mere naked power of attorney.

If these views be correct, then all the errors assigned should be sustained, and the evidence allowed to be introduced and another trial ordered. But we insist that from the reading of the contract itself the judgment of the Court quieting Burns' title against any claim whatever of Taylor's, of any kind or character in or to these said mining claims, should be reversed, and the Court should direct a decree according to law.

EUGENE S. IVES.

Tucson, Arizona, March 13, 1906.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
APR 12 1906
JAMES H. McKENNEY,
Clerk.

No. [redacted].28

CHARLES M. TAYLOR, APPELLANT,

v.

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEES.

WILLIAM HERRING,
SARAH H. SORIN,
Attorneys for Appellees.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21097

(19,776.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 275.

CHARLES M. TAYLOR, APPELLANT,

v.

THOMAS BURNS, JOHN A. DUNCAN, AND S. R. KAUFMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the supreme court of the Territory of Arizona affirming the judgment rendered in favor of appellees by the district court of the second judicial district of the said Territory in and for the county of Cochise.

On April 6, 1903, Charles M. Taylor, appellant herein, brought this action in said district court against appellees to quiet title to three mining claims situate in the California mining district, Cochise county, and known as the Victor,

Magnet, and Comet, of which the complaint alleges said Taylor to be the owner and entitled to the possession (Rec., p. 1).

Defendants filed their amended answer and cross-complaint on June 19 (Rec., pp. 5-10). The amended answer which is verified, denied that plaintiff was the owner or entitled to the possession of said claims, and set up that the defendant Burns, a citizen of the United States, was the owner thereof by virtue of the discovery and location of said claims—which location was made on the 27th day of February, 1900—and specifically alleges the performance by Burns of all of the acts required by the laws in relation to mining claims to entitle him to the ownership of said claims; that thereafter, on November 9, 1901, said Burns conveyed a one-fourth interest in said claims to said defendant Duncan, which deed was duly recorded, and that on the 9th day of March, 1903, the said defendants Burns and Duncan entered into an agreement with defendant S. R. Kaufman, trustee, for the sale of said three mining claims.

The amended answer further sets up the continuous possession of said claims by defendants since the date of said location, and that they have ever since had the ownership and right of possession thereto; that at the commencement of this action defendants Burns and Duncan were, and still are, the owners of said claims, and were, and ever since have been, entitled to the quiet, peaceable, and exclusive possession thereof (subject only to the right of defendant Kaufman under his said agreement) by virtue of said location and the compliance with mining laws.

The defendants plead the statute of limitations, alleging that the cause of action stated in the complaint did not ac-

crue within two years next before the commencement of this action. The answer concludes with a prayer for affirmative relief, that defendants be decreed to be the owners of said mining claims, etc.

The cross-complaint (Rec., pp. 7-9), also verified, sets up the facts of discovery, location, possession, and ownership of the claims substantially as alleged in the amended answer, and in addition thereto alleges:

"That defendants are credibly informed and believe, that "said plaintiff, Charles M. Taylor, makes some claim to said "mining claims adverse to these defendants; that the claim "of said Charles M. Taylor to the premises above described "is without any right, and that said Taylor has no right, "title, interest or estate whatever in and to said premises, or "any part thereof."

Defendants prayed for a decree quieting title to the premises in question and declaring and adjudging, among other things, that defendants are the owners of and entitled to the possession of said Victor, Magnet, and Comet mining claims as their several interests may appear; that plaintiff be barred and forever estopped from having or claiming any right or title to the said premises adverse to these defendants, and for general relief.

Plaintiff's verified answer to defendants' cross-complaint (Rec., p. 10) admits the allegations of the cross-complaint as to the citizenship of Burns and his discovery, location, and working of the claims, and his compliance with the laws in relation to the location of mining claims, and his performance of the annual work thereon.

The answer to the cross-complaint also admits the allegations of the cross-complaint as to the deed from Burns to

Duncan, and the agreement between said last-named defendants and Kaufman, but alleges that said deed and said agreement are subject to the rights of plaintiff thereinafter alleged. The answer to the cross-complaint then alleges the making, execution, and delivery of a deed by Thomas Burns to the plaintiff, Taylor, on the 26th day of March, 1901, conveying to said Taylor the Magnet, Comet and Victor mining claims. The alleged deed is next recited at length. The answer to the cross-complaint then proceeds as follows:

"Under which said deed the said Burns conveyed to the "said plaintiff the said mining claims for good and valuable "consideration, upon the terms and conditions of the said "deed, and that thereby the said plaintiff became the owner "of the said mining claims, subject to the payment of $45,- "000, to be paid by the said plaintiff to the said Burns, "whenever he should sell the said mining claims, and in ad- "dition thereto one-eighth of whatever price he might sell "the said property for over and above the said $45,000. "That the said plaintiff is willing and anxious to carry out "and execute the said contract and to pay to the said Burns "the said amount of money if, and whenever, the plaintiff "shall sell the said mining claims according to the terms of "said contract." (Rec., p. 11.)

The above language is quoted because of the admissions therein made. The answer to the cross-complaint concludes with a prayer for affirmative relief.

Upon the issues raised by the pleadings above referred to, the case was tried.

With regard to the statement found on page 1 of appellant's brief, regarding the expenditure of money in developing these mining claims, a reference to the pages of the record referred to (pages 48, 49, and 50) shows that the statement is not supported by the record.

It *does* appear that certain work upon these claims "was done under a bond to Mr. Randolph" (Rec., p. 49), but there is no evidence in the record of any other work done on these claims by Taylor or Randolph or any of Taylor's "associates." There is no evidence in the record of any contract between Taylor and Burns under which any work was done or moneys expended on said claims. The record contains no evidence as to any expenditures by Taylor upon these claims.

It *does* appear that Randolph had men employed on the ground during the year 1900 and a portion of 1901, the said bond being then in force, and that for about three months in each year Burns received from him for services on said claims a salary of $100 per month (Rec., pp. 49, 50).

Appellant further states on page 1 of his brief that the exact nature of said contract (under which the work was done) is not disclosed, the court upon defendants' objection having excluded plaintiff's testimony with respect thereto.

A thorough examination of the record shows that no witness was interrogated by the plaintiff in regard to the nature of the contract under which the work was done, except the witness Thomas Burns, a witness for the defendants (Rec., p. 49), who, having testified on cross-examination that the work was done under a bond to Mr. Randolph, was asked several questions regarding it by the counsel for plaintiff, all of which he was permitted to answer (Rec., pp. 49, 50).

Upon a trial, plaintiff, in support of the allegations of the complaint as to his ownership of the claims in question, offered in evidence the "Memorandum of agreement" which is set forth in his answer to the cross-complaint (Rec., pp. 10, 11), insisting that it was a conveyance whereby the

title to the mining claims in question was vested in plaintiff (Rec., p. 37).

This agreement was admitted in evidence over defendants' objection, the court, however, stating that it would not construe the instrument to be a deed or a conveyance of title (Rec., p. 38).

During the progress of the trial the plaintiff expressly abandoned his claim against the defendant Duncan (Rec., p. 39).

The instrument under which Taylor claims title was not recorded until December 15, 1902 (Rec., p. 19), while the date of the deed from Burns to Duncan was made November 9, 1901, and recorded on November 25, 1901 (Rec., pp. 29, 30).

A letter from Taylor to Burns, in which Taylor refers to the agreement above referred to as an "option" (Rec., pp. 23, 24), was admitted in evidence for defendants.

The revocation of said agreement by Thomas Burns, dated February 27, 1903 (Rec., pp. 24, 25, and 26), and the letter from Burns to Taylor enclosing a copy of said revocation (Rec., p. 26), of which letter and revocation Taylor admitted the receipt (Rec., pp. 41-26), were admitted in evidence for defendants.

The agreement of sale made between Burns and Duncan and S. R. Kaufman was admitted in evidence and is found in the record (pp. 59-61).

Appellant, plaintiff below, has contended, as appears from his pleadings above referred to, that the agreement of March 26, 1901, is a deed vesting the title to the mining claims in Taylor.

The appellees contend that the instrument amounts to

nothing more than an authorization to Taylor to negotiate a sale of said claims upon the terms therein stated; that the instrument was revocable at will, and was revoked by Burns on February 27, 1903; that in no event could said instrument be made the basis for any relief to Taylor in an action to quiet title.

The case was tried to the court, and defendants obtained a judgment quieting their title to the mining claims in question. Upon appeal, the supreme court of the Territory affirmed the judgment (Rec., pp. 71-74).

The only issue involved in this appeal is the construction of the instrument referred to.

POINTS AND AUTHORITIES.

I.

The instrument under which plaintiff claims title shows upon its face:

1. That it is styled a "Memorandum of agreement."

2. The consideration therein stated is one dollar, the receipt of which is acknowledged, and "the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon" the Magnet, Comet, and Victor mining claims referred to in the complaint.

3. That while the instrument does state that upon such consideration the party of the first part "*sells* to the said party of the second part the said mining claims upon the terms and conditions following, to wit," it appears that the instrument is a mere authorization to Taylor to negotiate the sale of said mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess.

4. That the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."

5. That the instrument is executed by both parties and in duplicate.

6. That it was recorded at Taylor's request, but not as a deed.

II.

The instrument under which plaintiff claims title is not a deed of conveyance. Though an instrument contains words expressing an absolute transfer, it will not be construed as a deed if by taking the whole instrument together it appears that such was not the intention of the parties. Particular words may not be isolatedly considered, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties.

Jackson *v.* Meyers, 3 Johns., 388, 395.
Jackson *v.* Moncrief, 5 Wend., 26.
Dunnaway *v.* Day *et al.*, 63 S. W., 731.
Stewart *v.* Lang, 78 Am. Dec., 414.
Sherman's Lessee *v.* Dill, 2 *id.*, 408.
Wallace *v.* Wilcox, 27 Texas, 60, 67.
Peterson *v.* McCauley, 25 S. W., 826.
Ives *v.* Ives, 13 Johns., 236.
Jackson *v.* Clarke, 3 *id.*, 424.
Devlin on Deeds (2d ed.), sec. 7.
Williams *v.* Paine, 169 U. S., 76.
O'Brien *v.* Miller, 168 *id.*, 297.
Morrison *v.* Wilson, 30 Cal., 344.

III.

Courts will refuse to construe an instrument as a deed where from the instrument itself it is manifest that further conveyances are contemplated.

Jackson *v.* Moncrief, *supra.*
Williams *v.* Paine, *supra.*
Devlin on Deeds (2d ed.), sec. 8.
Peterson *v.* McCauley, *supra.*

IV.

The only one who can convey a good title is he in whom the title is vested.

To "convey" real estate is by a proper instrument to transfer the legal title to it from the present owner to another.

Abendroth *v.* Greenwich, 29 Conn., 365.
Cross *v.* Weare Commission Co., 153 Ill., 510; 38 N. E., 1038.

V.

Taylor himself, in his letter to Burns, written shortly before the commencement of the action, recognizes the instrument as giving him merely an option (Rec., p. 23).

VI.

A mining claim is real estate, and the title thereto can only be conveyed by deed.

Hopkins *v.* Noyes, 2 Pac., 280.
St. Louis M. & M. Co. *v.* Montana M. Co., 171 U. S., 650.
Manuel *v.* Wulff, 152 U. S., 505.
Gillis *v.* Downey, 85 Fed., 483.
Belk *v.* Meagher, 104 U. S., 279.
Harris *v.* Equator M. & S. Co., 8 Fed., 863.

Not only does our statute of frauds, paragraph 214, title 2, Conveyances, Revised Statutes of Arizona (1887), in force when this agreement was executed, provide:

"No estate of inheritance or freehold or for a term of more than one year, in lands and tenements, shall be conveyed from one to another unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

and paragraph 228 provide:

"The term 'land,' as used in this act, is declared to mean and include mines and mining claims."

but our statute of limitations, chapter 1, Limitation of Actions for Land, paragraph 2308, section 12, provides:

"The words 'real property,' wherever used in this act, are to be taken to mean mines and mining claims."

VII.

The authority conferred upon Taylor by the agreement of March 26, 1901 (Rec., p. 18), was not a power coupled with an interest. The interest is merely in that which is to be produced by the exercise of the power. Such an interest does not make the power irrevocable.

Hunt *v.* Rousmanier's Administrator, 8 Wheat., 174.
Mansfield *v.* Mansfield, 16 Am. Dec., 76; 6 Conn., 559.
Trickey *v.* Crowe, 71 Pac., 965.
Hall *v.* Gambrill, 88 Fed., 709.
Tinsley *v.* Dowell, 26 S. W., 948.
Blackstone *v.* Buttermore, 53 Pa. St., 266.
Hartley's Appeal, *id.*, 212.
Stitt *v.* Huidikoper, 17 Wall., 385.
Durkee *v.* Gunn, 21 Pac., 637.
Mechem on Agency, sec. 207.

VIII.

It was merely an authorization to Taylor to negotiate a sale of the mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess. No time being fixed for the duration of the contract, either party was at liberty to terminate it at will.

Trickey *v.* Crowe, *supra.*

Coffin *v.* Landis, 46 Pa. St., 426.

Sibbald *v.* The Bethlehem Iron Co., 83 N. Y., 378, 384.

John L. Rowan & Co. *v.* Hull, 47 S. E., 92.

Mechem on Agency, sec. 210.

Cadigan *v.* Crabtree, 70 N. E., 1033; 186 Mass., 7.

Knox *v.* Parker *et al.*, 25 Pac., 909.

IX.

Neither in terms nor by the nature of his contract does the principal bind himself not to revoke the authority conferred.

X.

The agent did not have the exclusive right to negotiate a sale, and therefore there was nothing to prevent the principal from making a sale of his own property.

York *v.* Nash, 71 Pac., 59.

Baars *v.* Hyland, 67 N. W., 1148.

Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal., 606.

XI.

The existence of a consideration would not of itself operate to transfer the title from Burns to Taylor, and could not alter the effect of the instrument nor aid in its construction.

Mansfield *v.* Mansfield, *supra.*

XII.

There was, however, no consideration for the agreement.

1. An executed or past consideration is no consideration for a promise unless it is a promise which the law will imply.

1 Parsons on Contracts (5th ed.), 468, 472, 473.

Comstock *v.* Smith, 7 Johns., 87.

6 Am. & Eng. Enc. Law, 690-691.

2. Where there is an executory consideration in an agreement, until the performance of the condition of the promise there is no consideration and the promise is *nudum pactum.*

Miller *v.* McKenzie, 95 N. Y., 575, 579.

XIII.

As no error was assigned by appellant in the supreme court of Arizona upon the ruling of the trial court in excluding from evidence the release executed by Taylor and Beuhring, March 26, 1901, the error, if such, is waived and this court will not consider it.

See stipulation by attorney for appellant filed in this court as to assignment of errors on appeal to the supreme court of the Territory.

Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 163 U. S., 564.

Keyser *v.* Hitz, 133 *id.,* 138.

Grayson *v.* Lynch, 163 U. S., 468, 479.

Old Jordan Min. & M. Co. *v.* Société Anonyme Des Mines, 164 U. S., 261.

Montana Ry. Co. *v.* Warren, 137 U. S., 348.

San Pedro & C. D. A. Co. *v.* U. S., 146 U. S., 120.

XIV.

While the Revised Statutes of Arizona, 1901, do not require that on an appeal to the supreme court of the Territory an assignment of errors must be filed in the trial court, paragraph 1586 of said statutes requires that the errors be assigned in the appellant's brief.

Santa Cruz County *v.* Barnes *et al.*, 76 Pac., 621.

Said paragraph 1586 provides that the brief and argument of the appellant "must plainly state the errors complained of by him and refer to the page or pages of the record wherein the error is alleged by him to exist." (See also Rule 4, Rules Supreme Court of Arizona, 71 Pac., page VII.)

XV.

Appellant's brief contains no specification of errors such as is required by Rule 21. The attempted specification of error on page 17 of appellant's brief, in relation to the alleged rejection of evidence as to certain releases and powers of attorney, does not quote any of the rejected evidence, the names of the witnesses are not given, and there is no reference to the pages of the record where the rulings complained of are to be found. Errors not specified in accordance with the rule will be disregarded.

Portland Co. *v.* United States, 15 Wall., 1.

Benites *v.* Hampton, 123 U. S., 519.

XVI.

Where several considerations are stated in a written contract which is recited at length in the pleadings and the

pleadings contain no allegation of additional and different considerations, evidence of such additional and different considerations is properly rejected.

XVII.

Although the question whether Duncan was an innocent purchaser cannot arise in this case, evidence that he paid a valuable consideration for his conveyance, and that at the time of such conveyance he had no knowledge of the unrecorded agreement between Burns and Taylor sufficiently establishes that he was a *bona fide* purchaser.

XVIII.

The contract between Burns and Taylor did not vest in the latter any estate, right, title, or interest in the mining claims and cannot be made the basis for any relief in an action to quiet title.

ARGUMENT.

The agreement of March 26, 1901, between Thomas Burns and Charles M. Taylor (Rec., p. 18), is the sole foundation of appellant's claim to the relief demanded in the complaint.

The only issue involved in this appeal is the construction of this instrument. The appellant, plaintiff below, set it up in his answer to the cross-complaint as a deed by which the defendant Burns conveyed to him the mining claims therein referred to (Rec., p. 11).

On his appeal to the supreme court of the Territory of Arizona, the appellant contended that the instrument vested in Taylor the title to the mines (Rec., p. 72).

In his brief filed in this court the appellant contends that the instrument vested in Taylor a seven-eighths interest in the mining claims in question, which seven-eighths ownership of Taylor's is vested and indefeasible (Appellant's Brief, pages 5 and 6).

The appellees insist that the instrument is not a deed, and did not vest in Taylor any right, title, or interest to the claims referred to; that the instrument is a mere authorization from Burns to Taylor to sell and negotiate the claims for a certain price, and in the event of such sale to retain out of such purchase price a certain amount as his commission.

Appellees contend that in no event could the instrument in question be made the basis for relief to plaintiff in an action to quiet title; and, further, that whatever its force and effect may have been, it was revocable, and that it was revoked by Burns on February 27, 1903, and before Taylor had exercised the authority thereby conferred.

I.

Appellees submit that the agreement itself shows that it was a mere authorization from Burns to Taylor to negotiate the sale of the claims therein referred to upon a commission. No doubt can arise as to the purport of the instrument when the paper is taken as a whole and analyzed.

It appears upon the face of the instrument:

1. *That it calls itself a "Memorandum of agreement."*

The appellant contends that mining claims may be sold by bill of sale as well as by deed, but it is a significant fact that the parties to this instrument have designated it a

"Memorandum of agreement." We may assume from the title of this instrument that the parties thereto regarded it as neither a deed nor a bill of sale.

2. *The consideration therein stated is "the sum of one dollar, lawful money of the United States of America, in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim and the Victor mining claim, situate in the California mining district, in the Chiricahua mountains, Cochise county, Arizona Territory."*

The consideration recited in the instrument, therefore, consists, 1st, of a nominal consideration; 2d, of an executed or past consideration—"money and labor heretofore expended" in and upon said claims; 3d, "labor to be hereafter expended in and upon" said claims.

Appellant's theory that the instrument transferred the title and ownership of the mines to Taylor is certainly refuted by the character of this executory consideration. To contend that the promise of labor to be performed in and upon mines could be intended as a consideration for an instrument, the effect of which was absolutely to divest the owner of his title to those very lands, and therefore of all interest in the performance of such labor, would be an absurdity.

3. *That while the instrument does state that upon such consideration the party of the first part "sells to the said party of the second part the said mining claims upon the terms and conditions following, to wit:", it appears that the instrument is a mere authorization to Taylor to negotiate the*

sale of said mining claims for any price over $45,000, and to retain as his commission seven-eighths of such excess.

The terms and condition referred to are as follows:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars ($45,000.00) and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000.00."

The instrument, after having stated that the party of the first part sells to the said party of the second part the said mining claims upon the terms and conditions just recited and quoted, next proceeds to give in unmistakable language the interpretation which the parties themselves placed upon the instrument, as follows:

"that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000.00, and may retain out of said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00."

If, therefore, from the language previously employed in the instrument any doubt could arise as to its purpose and effect, such doubt is wholly dissipated by the language last above quoted.

The clause just quoted is "in its very terms an exposition of the sense in which the words making up the first clause are used by the parties." The clause just quoted is but a *videlicet* (Morrison *v.* Wilson, 30 Cal., 344).

It is evident that it is solely from the fact that Taylor is authorized to retain seven-eighths of the selling price above the sum of $45,000 that the appellant argues that the instrument conveyed to Taylor a seven-eighths interest in the mines, as there is no language found in the instrument which in terms refers to the transfer of such interest. If the appellant's reasoning could be upheld, it would follow that where an agent is permitted to make a sale and retain as his commission *all* over a certain figure, it would necessarily result that the agent thereby becomes the sole owner of the property.

It is true that the instrument provides that—

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible."

We submit that there is nothing in this language at all inconsistent with the defendants' contention that the instrument is a mere authorization to sell. The owner was presumably anxious that a sale should be effected, and the agent that his commission should be earned.

4. *That the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same."*

This language sufficiently shows that the instrument was not regarded as transferring the title of the claims to Taylor. Its only effect is to provide that if Taylor finds a purchaser for the mines at the price fixed by the owner, the owner will convey his title to the purchaser.

5. *That the instrument is executed by both parties and in duplicate.*

This fact further supports the contention of appellees that the instrument is not a deed.

6. *That it was recorded at Taylor's request, but not as a deed.*

The endorsement upon the agreement (Rec., p 19) shows that it was filed and recorded in the recorder's office, Tombstone, Cochise county, Arizona, at request of Charles M. Taylor, December 15, 1902, in Book 6, Miss. (Misc.) Records, page 474.

II.

The instrument under which plaintiff claims title, the said agreement of March 26, 1901, is clearly not a deed of conveyance. In contending that the instrument is a deed, the appellant's main reliance is upon the use therein of the word "sells." However, particular words may not be isolatedly considered, but the instrument must be considered as a whole in order to ascertain the intention and obligation of the parties (O'Brien *v.* Miller, 168 U. S., 297).

An instrument will not be construed as a conveyance, though it contains words of present purchase and sale, if upon construing those words in reference to the whole instrument it appears that such was not the intention of the parties (Jackson *v.* Moncrief, 5 Wend., 26).

In the case of Jackson *v.* Meyers, 3 Johns., 386, 394, it is held that "the intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement."

Where an instrument declared on as a deed and styled an indenture recited that for a certain consideration "the parties of the first part * * * have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part, and to its successors and assigns," certain property upon conditions thereinafter stated, the supreme court of Missouri held that, notwithstanding the words "grant, bargain and sell" in such instrument, it was a mere option (Dunnaway *v.* Day *et al.*, 63 S. W., 731).

Where the strongest words in an instrument were these: "I, James Henderson, have this day sold and delivered to J. H. Fowler, his heirs and assigns forever, * * * and hereby bind myself, my heirs and executors, to make a good warranty deed to the same," etc., it was held that it did not contain words indicating a conveyance of title *in præsenti* (Peterson *v.* McCauley, 25 S. W., 826).

In the case last cited the court comments upon the fact that there is no *habendum, redendum,* warranty, or other clause usually found in deeds of conveyance. These elements are also lacking in the instrument here under consideration. And "The strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument, a contrary intent be apparent." (Devlin on Deeds (2d ed.), sec. 7.)

Under the authorities cited it is clear that the effect of the instrument is not to be controlled by an isolated expression. If the instrument, taken as a whole, shows that a legal term is obviously employed in a sense contrary to its usual meaning, the intention must control (Morrison *v.* Wilson, 30 Cal., 344).

And the subsequent language of the instrument,

"that is to say, the party of the second part is authorized to sell and negotiate the said mines for any price above the said sum of $45,000.00, and may retain out of such purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.00,"

clearly shows that the instrument was not intended to affect a transfer of the title.

The plaintiff, having declared on this instrument as a deed, cannot properly object that there should be applied to it the tests applicable to such an instrument.

Under the authorities above cited it is manifest that, upon a consideration of the whole instrument, the word "sells" cannot have the force and effect which appellant claims for it.

III.

The instrument itself furnishes us with a further reason why it cannot be construed as a deed.

Burns, the owner of the claims, agrees to execute any deeds or conveyances that may be necessary to convey a good title to said claims to whomsoever may purchase the same. This agreement on the part of Burns and the contention that by this instrument he divested himself of his title are entirely repugnant.

Courts have uniformly refused to construe an instrument as a deed where from the instrument itself it is apparent that further conveyances are contemplated.

This rule is laid down in Devlin on Deeds, section 8, and the court so held in the cases of Jackson *v.* Moncrief, Williams *v.* Paine, and Peterson *v.* McCauley, *supra.*

IV.

The only one who could convey a good title is he in whom the title was vested.

The location of the claims by Burns and his performance of the annual work thereon, the acts necessary to constitute him the owner of the claims, are admitted by the pleadings (Rec., p. 10).

The only right the plaintiff seeks to maintain in this action is such right as was derived from the agreement of March 26, 1901. It is apparent that the significance of the term "convey" as employed by the parties to this instrument was properly understood. From the context it is clear that they recognized the necessity of a deed from Burns, the owner, to the purchaser whom Taylor might find, in order to convey or transfer the legal title from Burns to such purchaser. To "convey" real estate is by a proper instrument to transfer the legal title to it from the present owner to another (Abendroth *v.* Greenwich, 29 Conn., 365; Cross *v.* Weare Commission Co., 153 Ill., 510; 38 N. E., 1038).

V.

In a letter written by the appellant Taylor to Burns shortly before the commencement of this action we find that Taylor recognizes the instrument as giving him merely an option (Rec., pp. 23, 24). It will be noted that the date of this letter, February 23, 1903, is subsequent to the agreement of March 26, 1901. On page 40 of the record the witness Burns testified that he got a letter from Taylor about that agreement. This letter was offered in evidence and marked Defendants' Exhibit No. 1. So that it is clear that

the instrument referred to in the letter is the agreement now under discussion, and the letter itself refers to a copy of a paper enclosed and quotes certain portions of the agreement of March 26, 1901. Taylor refers in this letter to "these three claims (which I have an unlimited option on, as the enclosed paper will show you)." And he subsequently refers to these claims by name as the Magnet, Victor, and Comet. Further on in the same letter we find the following language: "I feel sure that I can make a deal with the whole group if you will be reasonable with me, but if you don't want me to try to sell the claims which I have no option on, why so good, but I am determined to bond the three which I have an option on to the first party that comes along who means business, and will bond for more than $45,000.00, which will leave me a fair profit, after the $45,000.00 has been paid to you." (Rec., p. 24.)

Argument is unnecessary to show that a construction placed upon the terms of an instrument by one of the parties thereto, against his own interest, and wholly at variance with the construction which he is now claiming for the instrument, is binding upon him.

VI.

The appellant contends in his brief that a mining claim under our statute may be sold by a bill of sale.

This court has said in the case of St. Louis M. & M. Co. *v.* Montana M. Co., 171 U. S., 650, "Where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator."

"A location as provided by law, and possession and compliance with the local rules and customs, gives to the locator

such an interest in the ground located, as that the Government has no interest or estate therein that can be granted or conveyed to any other person; and in such a case the Government holds the naked title in trust for the locator or his assigns." (Hopkins *v.* Noyes, 2 Pac., 280. See also Manuel *v.* Wulff, 152 U. S., 505, and Gillis *v.* Downey, 85 Fed., 483.)

The Arizona statutes in relation to conveyances and also in relation to limitations in force at the time of the execution of this agreement (which sections are quoted at length under point VI, *supra*) clearly indicate that the owner of a mining claim is the owner of an estate in lands, and that a deed of conveyance is the only proper method of conveyance by which the title of the locator can be transferred.

The rights in mineral lands granted to the locator by section 2322, Revised Statutes of the United States, descend to his heirs (Belk *v.* Meagher, 104 U. S., 279).

An estate of inheritance, we suggest, is not properly transferred by a bill of sale. The fact that appellant has brought an action to quiet his alleged title to these mining claims destroys the effect of his contention that they may be transferred as personal property.

VII.

The appellant contends that, whatever the court may decree this instrument to be, it vested in Taylor a "right coupled with an interest," and therefore was not revocable at the will of Burns. What he may mean by a "right coupled with an interest" is not explained; but if he claims that the instrument vested in Taylor a power coupled with an interest, the case of Hunt *v.* Rousmanier's Administra-

tor, 8 Wheat., 174, which he cites, is directly opposed to his contention.

The only interest which Taylor has in the instrument under consideration, or which he can derive thereunder, is an interest in the proceeds of the sale of the mines which he is authorized to make. The interest which can make a power irrevocable is an interest in the thing which is the subject of the power.

As stated by Chief Justice Marshall in Hunt *v.* Rousmanier's Administrator, *supra,* in discussing the essential elements of a power coupled with an interest:

"A power must be engrafted on an estate in the thing. * * * 'A power coupled with an interest' is a power which accompanies, or is connected, with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it."

The court further proceeds:

"The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

In the case of Hall *v.* Gambrill, 88 Fed., 709, the court had under consideration whether the fact that a power to sell land which authorizes the agent to retain a percentage of the purchase-money in payment for his services makes it a

power coupled with an interest. The court, after considering the case of Hunt *v.* Rousmanier's Administrator, uses the following language:

"Applying the principle as stated by Chief Justice Marshall,—the power ceases when the interest commences, and therefore cannot be coupled with it,—can it be said that Hall had an interest in the contract until he exercised the power to sell? Clearly, he had no interest that would accrue to him until after the sale was made. His commissions were the only interest he had, under the contract, and the same were contingent upon a sale. * * * A failure to sell before a revocation of the power would terminate all interest he had under the contract, which clearly shows that his interest was contingent on being able to sell the land, and was in no sense an interest running with the land."

A mere interest in the results or proceeds of the execution of an authority, as by way of compensation, is not enough.

"Thus, where one is given authority to sell the lands or other property of another, and is to have a certain commission or share out of the proceeds for making the sale, the authority may be revoked at the will of the principal, even though in terms it was declared to be exclusive or irrevocable; and so where one was authorized to collect a debt, and was to have one-half of what he collected for his services, the power was held not to be coupled with a sufficient interest, and was therefore revocable by the principal at will. The interest in the commission to be earned and in the moneys expended in endeavoring to carry out the agency, is not sufficient to prevent revocation." (Mechem on Agency, sec. 207.)

The supreme court of Arizona in the recent case of Trickey *v.* Crowe, 71 Pac., 965, expressly held that an authority to sell a mining claim on commission is not an au-

thority coupled with an interest. To the same effect are Mansfield *v.* Mansfield, 6 Conn., 559, Blackstone *v.* Buttermore, 53 Pa. St., 266, and other authorities cited under Point VII.

It is not claimed by appellant in the present case that before the execution of the contract of March 26, 1901, Taylor had any interest whatever in either the Magnet, Comet, or Victor claims. The rights which he is here seeking to enforce are those derived under that contract. It therefore devolves upon him to show that the instrument conveyed to him an interest in the property—an "estate in the thing"—so that his power or authority is coupled with an interest in the subject of the power. The contract confers upon him a power to sell, but it does not grant an interest in the mining claims to be sold by him. As his only interest is in the proceeds to arise from the sale of the mines—that is to say, from the exercise of the power conferred by the instrument—it is clear under the authorities cited that the power cannot be held to be coupled with his interest. It is only after the power is exhausted that the interest is created.

VIII.

As the agreement amounts only to an authorization to Taylor to negotiate a sale of the mining claims for any price over $45,000.00, and to retain as his commission seven-eighths of such excess, and as no time is fixed for the duration of the agency, either party was at liberty to terminate it at will (Trickey *v.* Crowe, *supra*).

Unless the authority of an agent is coupled with an interest in the property itself which is the subject of the power, the authority of the agent may be revoked by the principal

at his will at any time, and this is true even though the authority be in express terms declared to be "exclusive" or "irrevocable" (Mechem on Agency, secs. 204, 210).

"Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirement of good faith." (Sibbald *v.* The Bethlehem Iron Co., 83 N. Y., 378, 384.)

It is admitted by the pleadings in the present case that Taylor had not made a sale of the property under the contract referred to (Rec., p. 11). Plaintiff alleges "That the said plaintiff is willing and anxious to carry out and execute the said contract, and to pay to the said Burns the said amount of money if and whenever the plaintiff shall sell the said mining claims according to the terms of said contract." We are here considering the *power* of the principal to revoke the authority conferred by the agreement referred to. The question of the liability to which a principal might subject himself by exercising such power contrary to his expressed or implied agreement in the matter does not arise in the present action and could only arise in an action brought by Taylor for commissions earned under the contract or in an action for damages for its breach. We have not that case. The only question before this court is, whether by the terms of that agreement Taylor was vested with a title to the property. As the authorities collected under Point VIII, *supra,* simply reiterate the rule as laid down in Mechem on Agency, we do not here refer to them separately.

It is well settled that where the agent has no interest which would accrue to him until after the sale is made, his failure to sell before a revocation of the authority or power to sell

would terminate the interest which he had under the instrument. From the failure of the parties to limit by the terms of the agreement the time within which the authority was to be exercised, it is to be inferred *not* that the power was irrevocable, but that the right to terminate it at any time was reserved.

Parties having entered into a relation which is revocable at pleasure unless otherwise expressly stipulated must have contemplated a termination of the authority (Coffin *v.* Landis, 46 Pa. St., 426).

Unless the agreement under consideration contains an express covenant binding Burns to accept and ratify a sale by the plaintiff for any price above the sum of $45,000.00, *made at any time*, he could before such sale was made withdraw and revoke Taylor's authority to sell (Stitt *v.* Huidikoper, 17 Wall., 398).

IX.

It is clear that the contract does not expressly provide that the authority shall not be revoked; neither is this to be inferred from the nature of the contract. The contention of appellant that by this agreement Burns gave Taylor the perpetual right to sell the property is too absurd, we submit, to require refutation. The supreme court of the Territory in the case of Trickey *v.* Crowe, *supra*, has held that a contract of the character now under consideration is revocable.

X.

It is urged by appellees that even an exclusive agency to negotiate a sale cannot prevent the owner himself from selling his own property. Such a sale is not even a breach of the contract of agency, and the granting of such an agency

could certainly not have the effect of transferring the title from the principal to the agent (York *v.* Nash, 71 Pac., 59; Baars *v.* Hyland, 67 N. W., 1148; Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal., 606).

XI.

The appellant apparently considers that because the authority is stated to have been given for a consideration, it therefore operates to transfer the interest in the mining claims from Burns to Taylor and is a power coupled with an interest. As said by Chief Justice Marshall in the case of Hunt *v.* Rousmanier's Administrator, *supra:*

"The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

We are referred to no authorities which hold that the fact that the authority is conferred upon the agent for a consideration of itself operates to transfer to the agent the title to the property which is the subject of the agency. The question of consideration, we submit, would be entirely immaterial, except as affecting the agent's right to damages, in a suit brought against the principal for a breach of the contract. The existence of a consideration could not determine the construction of the contract. In the case of Mansfield *v.* Mansfield, *supra,* in which the court was considering a power of attorney which it was contended was coupled with an interest, the court uses the following language:

"As it is not pretended, that before the execution of the power of attorney to Messrs. Ingersoll and Hitchcock, they had any interest in the estate confided to their care, they of

consequence have it devolved on them to show, that the instrument constituting them attorneys conferred on them an interest in the property, so that their power was coupled with an interest. On a construction of the instrument, according to the form of its expressions, and the object of the parties, I see no ground for this position. It professes to have been executed, in consideration of a preceding indebtedness; but I am not aware that this gives any aid in its construction. A power without consideration is equally valid as with one; and the expression means no more than that the indebtedness was the inducement operating on Mrs. Mansfield in conferring the power in question. We must look to other parts of the instrument to ascertain whether it trasferred any interest. * * * It has been established law, from before the days of Sir Edward Coke to the present time, that a power to sell and convey is a naked power, and revocable." (Mansfield *v.* Mansfield, 6 Conn., 559.)

The fact that a consideration is paid for a thing or for an authority does not alter the inherent nature of the thing itself. Whatever Taylor paid to Burns as the consideration for the agreement, all that he got was the authority from Burns to sell the mines upon the conditions stated in the instrument.

XII.

While appellees contend that the existence of a consideration for the contract of March 26, 1901, is entirely immaterial so far as the present case is concerned, the attention of the court is drawn to the fact that there was no consideration for the agreement.

1. It is well settled that an executed or past consideration is no consideration for a promise unless it is a promise

which the law will imply (1 Parsons on Contracts (5th ed.), 468, 472, 473).

The past consideration referred to is "money and labor heretofore expended * * * in and upon the Magnet mining claim, the Comet mining claim, and the Victor mining claim." (Rec., p. 10.)

Even had the money and labor been expended by Taylor upon the claims at Burns' request, the law would not imply from such fact a promise on the part of Burns to authorize Taylor to sell the property. There is no allegation in the pleadings and no evidence in the record that money and labor were so expended. On the contrary, it appears (Rec., p. 49) that "the work was done under a bond to Mr. Randolph." It also appears that the men employed to do the work were employed by Mr. Randolph (Rec., p. 48), and there is no evidence that any money or labor was expended upon the property prior to March 26, 1901, except under such bond. There is no evidence that Taylor ever expended any money on the property. It is a matter of common knowledge, of which the trial court and this court will take judicial notice, that in Cochise county, in which this suit was tried, the mining business and mining interests are paramount. The nature of a bond on a mining claim is also a matter of common and general understanding, as is also the fact that the work performed upon a claim by a man who takes a bond on it, as did Randolph, is done for his own convenience and at his own expense, in order that he may determine and satisfy himself whether the property is of sufficient value to justify its purchase.

The previous expenditure of money and labor, therefore, is not a consideration for an express promise to authorize a

sale of the property and allow a commission therefor; and especially is this the case where the authority is conferred upon a person other than he who expended the money and labor. (See also Comstock *v.* Smith, 7 Johns., 87; 6 Am. & Eng. Enc. Law, 690, 691.)

2. A portion of the consideration stated in this agreement is executory—"labor to be hereafter expended in and upon" the said three claims (Rec., p. 18). In the revocation of Taylor's authority by Burns, Defendants' Exhibit 2 (Rec., p. 24), given in evidence by the defendants (Rec., p. 41), the following language is found:

"And whereas the said Charles M. Taylor since said authorization to sell, negotiate or place said mines has wholly failed to expend any labor upon the said Magnet, Comet and Victor mining claims or in or upon either of said claims and has wholly failed and neglected to negotiate, sell or place said mines or either of them:

"Now, therefore, the authorization to the said Charles M. Taylor mentioned and referred to in said agreement, to sell and negotiate the said mines and every of them is hereby withdrawn, revoked, canceled and annulled."

The statement here found as to Taylor's failure to expend any labor on the claims since the authorization to sell on March 26, 1901, is nowhere contradicted.

It appears, therefore, that the executory consideration wholly failed, and that the labor referred to was never performed. Where there is an executory consideration in an agreement, there is no consideration and the promise is *nudum pactum* until the performance of the condition of the promise (Miller *v.* McKenzie, 95 N. Y., 575, 579).

XIII.

We find in appellant's brief the following statement on page 17:

"The court erred in not allowing Taylor to show that contemporaneous with this contract there were executed releases of all prior obligations of Burns to Taylor, and also a surrender of all powers of attorney and other documents previously held by him from Burns."

Passing by for the moment the question of the insufficiency of this statement as a specification of error under Rule 21, we draw the attention of the court to the fact that on appeal from the district court of Cochise county to the supreme court of Arizona there was no assignment of error presented to the supreme court of Arizona in relation to the rejection of any release, and appellees urge that inasmuch as this court is here reviewing the judgment of the supreme court of Arizona, it will not now consider an error which was not complained of or assigned in that court. As, therefore, the question of the rejection of any release as evidence was not assigned as error in the supreme court of Arizona, the court will not consider it (Union Pac. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 163 U. S., 564, 593).

This court has said in the case of Old Jordan M. & M. Co. *v.* Société Anonyme Des Mines, 164 U. S., 261, 264, that it can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion, of the court below.

In the case of San Pedro & C. D. A. Co. *v.* U. S., 146 U. S., 120, it was held that if error was to be predicated upon any ruling of the supreme court of the Territory, that such error shall affirmatively and distinctly appear.

In another case in which this court was reviewing the judgment of the supreme court of the Territory of Montana (Montana Ry. Co. *v.* Warren, 173 U. S., 348), it was held that the inquiry of this court is limited to the matters presented to and considered by the supreme court of the Territory.

Since the adoption of the Revised Statutes of Arizona, 1901, an appellant from the district court to the supreme court of the Territory has not been required to file an assignment of errors in the trial court, and the supreme court of the Territory has held in Santa Cruz County *v.* Barnes *et al.*, 76 Pac., 621, that it is sufficient that the assignment of errors should appear in the appellant's brief. Paragraph 1586, Revised Statutes of Arizona, 1901, provides that the brief of appellant "must plainly state the errors complained of by him and refer to the page or pages of the record wherein the error is alleged by him to exist."

Rule 4, subdivision 2, Rules Supreme Court of Arizona (71 Pac., page VII), also requires that the brief of appellant or plaintiff in error shall contain, in the following order and separately stated:

"(1) A concise statement of the case, presenting succintly the questions involved and the manner in which they are raised.

"(2) An assignment of the errors relied upon.

"(3) The argument, exhibiting a clear statement of the points of law, or facts to be discussed, under each assignment of error relied upon, with a reference to the folios of the abstract of the record that are pertinent thereto, and the authorities relied upon in support thereof."

As no assignment of error was filed by the appellant in the trial court (in which case it would have become a part

of the record on appeal to the supreme court of the Territory—Santa Cruz County *v.* Barnes *et al., supra*), and as under our present practice the assignment of errors is only contained in the appellant's brief, the appellees herein have procured from Mr. Eugene S. Ives, the attorney for the appellant, and filed in this court a stipulation as to the assignment of errors on appeal to the supreme court of the Territory, to which the court is respectfully referred. The briefs of appellant filed in the supreme court of the Territory are made a part of such stipulation, and it therein appears that no error was assigned upon the rejection from evidence of any release.

XIV.

Not only did appellant fail to bring to the attention of the supreme court of Arizona any ruling of the trial court regarding the rejection of any release offered in evidence by plaintiff, but appellant's brief filed in this court contains no specification of errors such as is required by Rule 21.

If the statement referred to on page 17 of his brief and above quoted is to be regarded as an attempted specification of error, it wholly fails to meet the requirements of the rule. The rejected evidence is not quoted. The names of the witnesses are not given. There is no reference to the pages of the record where the rulings complained of are to be found. Where such is the case, the error, if such, will be disregarded (Portland Co. *v.* United States, 15 Wall., 1; Benites *v.* Hampton, 123 U. S., 519).

Error should be specified with precision. Without searching through the entire evidence in the record, there is no means of ascertaining what particular rulings the appellant

complains of. We respectfully suggest that no duty rests upon the court or upon opposing counsel to make such investigation.

From the statement found on page 3 of appellant's brief, that it will therefore be unnecessary to consider in detail the exceptions to the rulings of the court upon evidence, and as no rulings upon the admission or rejection of evidence are specified as provided by Rule 21, we must assume that appellant himself does not regard his brief as presenting for the consideration of this court any questions upon the admission or rejection of evidence.

XV.

From appellant's further statement on page 17, it appears that "all these things (*i. e.,* the rejected evidence) tend to show the magnitude of the consideration, what the consideration was."

Even had the question of the exclusion of such evidence been properly raised by appellant in his brief, we submit that the contract was set forth in appellant's pleading *in hæc verba* (Rec., pp. 10, 11).

The consideration is specifically and fully set forth in the instrument itself. The pleadings of plaintiff contain no allegation of any further or additional consideration. Conceding that under our present statute a written instrument imports a consideration, and that where none is expressed the real consideration, if necessary to be shown, can be proven *under proper allegations in the pleadings*, appellees insist that where, as in the present case, the instrument specifically stating the consideration and purporting to state the entire consideration is set up in the pleadings, and there

are no proper allegations in such pleadings of an additional and different consideration, that evidence that there were additional and entirely different considerations, such as (in the language of appellant's brief, p. 17) "releases of all prior obligations and a surrender of all powers of attorney and other documents previously held by him from Burns," would be properly rejected. Such evidence sheds no light upon issues made by the pleadings, and is therefore irrelevant. It would vary the written contract by parol, and is therefore incompetent. The existence of a consideration, as hereinbefore contended by appellees, would not operate to divest Burns of his title and convey it to Taylor, and therefore such evidence, if received, would be immaterial; and, further, had such evidence been admitted, the result must have been to establish a different contract from that declared on by appellant, and the variance resulting would have been fatal.

XVI.

Inasmuch as the contract of March 26, 1901, vested no interest in the mines in Taylor, the rights of defendant Duncan under his deed from Burns (Rec., p. 29) and the rights of Kaufman under his agreement of sale from Burns and Duncan could not be affected thereby. While it is, therefore, unnecessary to discuss the appellant's proposition that the answers and cross-complaints of such defendants do not set forth facts sufficient to establish rights as *bona fide* purchasers without notice, we beg to draw the attention of the court to the fact that it is only in plaintiff's answer to the cross-complaint that anything is alleged regarding this contract.

Allegations of the cross-complaint (Rec., p. 8) as to the

conveyance from Burns to Duncan of an undivided one-fourth interest in the claims and the allegation as to the agreement between Burns, Duncan, and Kaufman, trustee, for the sale of said three claims are admitted (Rec., p. 10); but the plaintiff alleges that the deed from Burns to Duncan and the contract between Burns, Duncan, and Kaufman are subject to the rights of the plaintiff.

Under paragraph 1357, Revised Statutes Arizona, 1901, "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted." The allegations of the plaintiff's answer were therefore deemed denied. The court's attention has been drawn by us to the admission by Mr. Barnes, counsel for plaintiff (Rec., p. 39):

"By Mr. BARNES: I find that I will have to abandon my claim against Mr. Duncan. I am satisfied that I can't prove his actual knowledge. I thought I could by Mr. Burns, but I find that I can't do it."

Afterwards, when Mr. Duncan was on the stand and had testified as to the deed for his one-fourth interest, and said deed had been admitted in evidence (Rec., p. 56), and the witness had testified that at the time of the conveyance to him he had no notice or knowledge of the agreement between Burns and Taylor, on cross-examination by Mr. Barnes, counsel for appellant, he testified as follows:

"Q. You say that at the time this deed was made to you you had no knowledge of any contract between Taylor and Burns?

"A. Yes sir.

"Q. That deed was given to you for the consideration expressed in the deed?

"A. Yes sir." (Rec., p. 57.)

The Record, page 19, shows that the agreement between Taylor and Burns was not recorded in the recorder's office, Cochise county, until December 15, 1902.

As Duncan's deed was in evidence and the consideration stated therein was "one ($1.00) dollar, and for other valuable considerations to me in hand paid by John A. Duncan," etc., (Rec., p. 29), the evidence elicited by the appellant's counsel shows that a valuable consideration was paid by the purchaser.

Mr. Burns testified (Rec., p. 43) that from the time of the location of those mines up to the last few months, he had been in possession. As, therefore, Duncan is shown by uncontradicted evidence, admitted without objection, to have paid a valuable consideration for the conveyance of his one-fourth interest, and to have been a purchaser in good faith, we respectfully suggest that the appellant's contention is without foundation.

The case, we submit, presents no foundation whatever for appellant's theory that the instrument expresses the intention of the parties that "Burns was to give Taylor the right perpetually to sell the entire eight-eighths interest in the property, with the sole limitation that he should not make such sale for less than $45,000.00." (Appellant's Brief, p. 5).

Such a theory is entirely destroyed by the unmistakable language of the instrument itself. It is to be noted that Taylor never effected a sale of the property, and by the terms of the instrument is not bound ever to effect a sale, or to pay the purchase price or any part of it to Burns; there is no mutuality about the contract. From the language at the conclusion of the contract, that it is "to take the place of and supersede any and all contract or contracts heretofore

made by the said parties hereto with reference to said mining claims," nothing further is to be inferred than that this contract was regarded by the parties as the final and definite expression of their agreement with regard to these three claims.

Taking the instrument as a whole, appellees contend that it amounts merely to a naked authority to sell. All that Taylor could have derived under it in any event was his commissions. It is most certainly neither a deed nor a "power coupled with an interest."

In conclusion, we submit that appellant has wholly failed to establish any right or title to the mining claims of which he claims to be the owner. The contract which he sets up in his pleadings, and which he offered in evidence as the foundation of his alleged right to relief, is wholly ineffectual to vest in him any right or title to the premises in controversy or to entitle him to any relief whatever in this action.

The judgment of the supreme court of the Territory of Arizona should be, therefore, affirmed.

Respectfully submitted,

WILLIAM HERRING,
SARAH H. SORIN,
Attorneys for Appellees.

Supreme Court of the United States.

No. 28.—October Term, 190 .

Charles M. Taylor, Appellant,
vs.
Thomas Burns, John A. Duncan, and S. R. Kauffman.

Appeal from the Supreme Court of the Territory of Arizona.

[November 12, 1906.]

On March 26, 1901, Thomas Burns, the owner of three mining claims, as party of the first part, and Charles M. Taylor, as party of the second part, made the following agreement:

"The said party of the first part, in consideration of the sum of one dollar, lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended and of labor to be hereafter expended in and upon the Magnet mining claim, the Comet mining claim and the Victor mining claim, situate in the California mining district, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit:

"The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars ($45,000), and in addition thereto one-eighth (⅛) of whatever price the said party of the second part may be able to sell, place or negotiate the said mines, for a consideration in excess of said $45,000; that is to say, the party of the second party is authorized to sell and negotiate the said mines for any price above the sum of $45,000, and may retain out of the said purchase price seven-eighths (⅞) of said selling price above such sum of $45,000.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims. This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto with reference to said mining claims."

On November 9, 1901, Burns deeded a one-fourth interest in the mining claims to John A. Duncan, and on March 9, 1903, Burns and Duncan conveyed the entire property to S. R. Kauffman as trustee. On February 27, 1903, Thomas Burns executed and filed for record a revocation of all authority given by the agreement to Taylor, and notified him by letter of such revocation. On April 6, 1903, Taylor filed his bill of complaint in

the District Court for the county of Cochise, Territory of Arizona, against Burns, Duncan and Kauffman, alleging that he was the owner of the mining claims, that defendants claimed to have some interest in them, and praying to have his title thereto quieted. The defendants answered, and also filed a cross bill, alleging in substance that plaintiff had no title whatever, and praying that their title be quieted as against him. A trial in the District Court resulted in a decree in favor of the defendants, which was affirmed by the Supreme Court of the Territory, 76 Pac. Rep. 623, and thereupon the case was brought here on appeal.

Mr. Justice BREWER delivered the opinion of the Court.

This case turns upon the scope and effect of the agreement of March 26, 1901. It is claimed by plaintiff that it is a conveyance, passing title; by defendants, that it is simply a power of attorney, subject to revocation. Its meaning is to be determined by a consideration of all its terms and not by any particular phrase. The first paragraph recites a consideration, and states that for the consideration the first party "sells" the claims to the party of the second part. If this were all it would suggest a purpose to pass title, but the paragraph closes with a reference to further stipulations, its language being "sells to the said party of the second part the said mining claims upon the terms and consideration following, to wit." The next paragraph authorizes the party of the second part to "sell and negotiate" the mines for any sum above $45,000, and to retain out of this purchase price seven-eighths of the excess of $45,000, while in the last paragraph the party of the first part "agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims."

Nowhere in the instrument does the party of the second part assume any obligations, except the general one in the third paragraph, by which both parties mutually agree to aid each other in the negotiation and sale of the mining claims. The instrument does not in terms grant or convey. The nearest approach to a word of conveyance is "sells." This is more apt in describing the passing of the title of personal than of real property. Not that this is decisive, for not infrequently it is held to manifest an intent to convey the title to the property named, whether real or personal. But when the purpose of the transaction is stated the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose. The purpose here named was the giving of authority to make a sale to some third party at not less than a named price, which price would belong to Burns, less the commission on the sale. For this it was not necessary to pass title with the authority. And it is not ordinarily to be expected that an owner will part with title before receipt of purchase price, or secu-

rity therefor. Appellant contends that by this instrument he became owner, while Burns was only an equitable mortgagee. But no time is fixed for the sale, and therefore no time for the maturity of the supposed debt, nor is any liability cast upon Taylor for the payment of any portion thereof. Indeed, its amount is uncertain, whether $45,000, or $45,000 plus one-eighth of a price which should or could be realized on a sale. If it were true that title passed then Taylor could immediately convey to a third party, who, by payment of $45,000, would acquire the property. We need not inquire whether there was a breach of contract for which Taylor could recover damages. The question here is the effect of the contract upon the title. While it may be conceded that the meaning and scope of the instrument are not perfectly clear, yet it seems more reasonable to hold that it was simply a grant of authority to Taylor to "sell and negotiate" the mines, and not also a transfer to him of the title to the property.

As such an instrument it was subject to revocation. It was not a power of attorney coupled with an interest. "By the phrase 'coupled with an interest,' is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate." *Hunt* v. *Rousmanier's Administrators*, 8 Wheat. 174. Now as we construe this contract, Taylor was to receive, in case he made a sale, seven-eighths of the price in excess of $45,000—that is, he was to be paid for making the sale. It was an interest in the exercise of the power and not an interest in the property upon which the power was to operate.

We see no error in the ruling of the Supreme Court of the Territory of Arizona, and its judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.